Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1996

Johnie Vollert,
Petitioner,

vs.

City of Houston,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A POLICE DEPARTMENT HAVE THE AUTHORITY TO CHILL AND SUPPRESS A POLICE OFFICER'S SPEECH REGARDING MATTERS OF PUBLIC CONCERN WHEN THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS DOES NOT OUTWEIGH THE OFFICER'S RIGHT TO FREE SPEECH?

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JURISDICTION

This Court has jurisdiction over this petition for writ of certiorari from a decision of the Fifth Circuit Court of Appeals under the provisions of 28 U.S.C. §1254. Federal Jurisdiction is proper under the United States Constitution, 28 U.S.C. §1331. The decision of the United States Court of Appeals for the Fifth Circuit was filed January 17, 1997, and Petitioner thereby timely filed a Motion for Rehearing which was denied on February 13, 1997, and this petition for certiorari was timely filed within ninety (90) days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

THIS QUESTION INVOLVES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

PROCEEDINGS BELOW:

Petitioner appealed to the Fifth Circuit Court of Appeals after a United States District Court for the Southern District of Texas granted Respondent's Motion for Summary

Judgment as a matter of law. The Fifth Circuit Court of Appeals affirmed the District Court's decision on January 17, 1997. It is from the Fifth Circuit Court of Appeal's decision that Petitioner requests that certiorari be granted and that the decision of the Fifth Circuit Court of Appeals be reversed with the case being remanded for the completion of discovery and trial.

FACTS:

In December 1992, the City of Houston and defendants in a suit styled *Dorothy Edwards, et al., v. City of Houston,* Civil Action Number H-92-2510, Southern District of Texas, tentatively settled by consent decree, a series of lawsuits which had ground-on for some sixteen years. Succinctly put, the various plaintiffs had alleged an ongoing pattern and practice of racial discrimination in hiring and promotions at the Houston Police Department ("HPD") (R.O.A. 301, 302).

The actual consent decree was entered in February 1993, and sought to settle all such lawsuits. Pertinent to this lawsuit is the manner by which past discrimination was to be remedied. First, the City was required to remedially promote a certain number of officers. Second, in future sergeants and lieutenants promotion tests, test questions were to be analyzed for possible racial bias. Using a log linear analysis, **after the test was taken**, racially biased questions and responses were to be eliminated. This *post-facto* adjustment potentially harmed those test takers who correctly answered the eliminated questions and answers. The first sergeant's exam to which the log linear analysis was applied was the exam taken by Petitioner Vollert, who is a white male. (R.O.A. 319).

Petitioner sat for the sergeants exam on March 5, 1993. Preparation for the exam was intense. The volume of knowledge covered required serious candidates to study very hard. Immediately after the exam was taken, test results were announced. Petitioner scored in the top twenty. (R.O.A. 319).

The consent decree caused concern among the rank and file police officers. (R.O.A. 273, 296-300). Local newspapers covered the unfolding story. (R.O.A. 272, 299). Many board members, including Petitioner, felt that the consent decree's remediation methods punished individuals who deserved a promotion because of their exam results. Also many board members realized that individuals who were promoted because of their race and minimum test results jeopardized the department's morale and efficiency. Highly competent individuals were passed over in the rush to remedy HPD's past transgressions. In short, a perception existed that merit was sacrificed to expediency. (R.O.A. 399-400).

Petitioner was a longtime member of the Houston Police Officer's Association ("HPOA"), a multi-ethnic policemen's labor organization (R.O.A. 275, 305), over which Chief Nuchia had no direct control. (R.O.A. 307). In May 1993, Petitioner was an elected member of the HPOA's Board of Directors. The HPOA also had minority board members, African-American and Hispanic (R.O.A. 243).

Throughout the time period that the consent decree was being negotiated, HPOA, as well as other police organizations discussed within their board rooms and in member meetings the consent decree's ramifications.[1]

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1. Several police organizations exist within the rank and file of HPD. Beside the HPOA, there is the Houston Patrol Union (HPPU), the African-American Police Officers League (AAPOL), the White Officers

(R.O.A. 270). During the Spring of 1993, in HPOA board meetings, Petitioner was very vocal about the inherent unfairness in the consent decree. He stated his opinions about merit versus remediation. (R.O.A. 251, 317-320). The HPOA's official stance was to oppose Chief Nuchia's philosophies and decision. (R.O.A. 301, 317-320). Predictably, the Organization for Spanish Speaking Officer's ("OSSO") and HPOA took opposite sides on the *Edwards* consent decree. (R.O.A. 258-259).

On May 17, 1993, a week before his scheduled promotion ceremony, Petitioner, while out of uniform and at the HPOA offices, composed an invitation to his promotion. The invitation expressed, in a satiric format, his feelings regarding the *Edwards* consent decree's effect on the promotion process. Petitioner believed that individuals who were undeserving of promotion were receiving promotions at the expense of individuals who were competent and qualified. It was not his intention to communicate racial slurs or jokes. (R.O.A. 317-320).

Petitioner made fifteen (15) copies of the invitation, placing one copy in each of the HPOA board members' mailboxes, both the minority and non-minority board members. This was the extent to which Petitioner communicated his invitation. (R.O.A. 317-320). On or about May 20, 1993, Officer Matt Perales ("Perales"), an HPOA Hispanic board member, found the invitation in his mailbox. Perales had been present in several HPOA board meetings in which Petitioner had expressed his opinions about the consent decree. (App. 250, 249). Perales worked in the HPD Personnel Office (R.O.A. 248). Several days

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Association (WHOA), and the Spanish Speaking Officers Organization (OSSO).

later, he shared Petitioner's invitation with Officer Ignacio Aranda ("Aranda"), who was the president of OSSO. (R.O.A. 247). The methodology on how Perales transmitted the invitation is conflicting. Whatever the method of transmission, Perales bypassed the prescribed rules for filing a grievance. (R.O.A. 264-265, 308). By his own admission, Perales availed himself of Aranda's political connections with Chief of Police Sam Nuchia ("Chief Nuchia"). (R.O.A. 241). Both Perales and Aranda seemed to share the same slighted feelings regarding Petitioner's invitation. (R.O.A. 245-246, 268-269).

Nevertheless, on or about May 25, 1993, Aranda, who was employed in the HPD's Internal Affairs Division ("IAD"), composed and sent a letter to Doug Elder, president of HPOA.[2] (R.O.A. 276-277, 379). Aranda proposed to allow HPOA to remedy what Aranda viewed as Petitioner's racist commentary. (R.O.A. 267). Aranda was also a member of HPOA, but not a board member. (R.O.A. 275).

Elder replied immediately to Aranda's letter (R.O.A. 376). Elder disavowed HPOA's agreement with Petitioner's beliefs, and he noted that Petitioner did not seek approval to use HPOA's letterhead. However, the response was not to Perales' and Aranda's satisfaction, for they had more punitive measures in mind. (R.O.A. 266). On June 7, 1993, Aranda wrote a letter to Chief Nuchia, a letter which Aranda hand-delivered. (R.O.A. 373). The entire process of bringing Petitioner's letter to Nuchia's attention by-passed the usual and customary methods of grieving problems. (R.O.A. 260, 264-265). This letter initiated an IAD investigation of Petitioner. (R.O.A. 370).

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2. Internal Affairs is an HPD investigatory body which investigates complaints registered by other officers or the public.

Between May 17, 1993 and June 29, 1993, the date IAD began its investigation (R.O.A. 370), several important events occurred. In his June 1993, newsletter to OSSO members, Aranda published his monthly front page letter. (R.O.A. 260, 323). Prior to this mass publication, Petitioner's invitation had not been posted or published elsewhere. (R.O.A. 242, 302). In the letter, Aranda almost verbatim published Petitioner's letter and then provided his own incendiary language, a veritable call to the barricades. (R.O.A. 242, 302). Aranda visited with Chief Nuchia regarding the status of the letter. (R.O.A. 261). Nuchia indicated that he was taking care of the situation through IAD. (R.O.A. 261).

The IAD investigation included the taking of a statement from Perales. (R.O.A. 359). Petitioner provided a statement as well. (R.O.A. 364). Afer the investigation of the complaint, IAD concluded that it should be sustained. (R.O.A. 354). This opinion was delivered through the chain of command, first, to Captain Tompkins, Petitioner's immediate supervisor, then to Tompkins''s supervisor, Assistant Chief of Police Simmons. Assistant Chief Simmons is a 28 hear veteran of HPD. (R.O.A. 313). Simmons had great familiarity with operations and procedures within HPD. (R.O.A. 310-312). Simmons worked closely with Chief Nuchia (App. 309) and kept close tabs on police officer morale. (R.O.A. 303-304). Between May 17, 1993, and the filing of the Aranda-Perales' complaint, Simmons did not notice any dissension or turmoil brought on by Petitioner's invitation. (R.O.A. 298, 302). Nor did he receive any complaints after the OSSO newsletter was published. (R.O.A. 294-295). Both Tompkins and Simmons believed that the least punitive punishment should be meted out, that is, a verbal counseling. (R.O.A. 281-284, 292-293). This they recommended to Chief Nuchia through Chief Assistant Breshears, Assistant Chief Management

Services Command. (R.O.A. 354). However, Chief Nuchia chose not to follow their recommendations, but rather chose a more punitive measure, the placement of a written reprimand in Petitioner's personnel file. (R.O.A. 351). Chief Nuchia, a licensed attorney, made the recommendation after consultation with HPD legal counsel and Simmons. (R.O.A. 286-290, 347).

The written reprimand branded Petitioner as a racist. (R.O.A. 284-285). Furthermore, this label potentially harmed Petitioner's future promotion possibilities. (R.O.A. 396).

Believing that his First Amendment rights were violated by Chief Nuchia, Petitioner filed a grievance against Chief Nuchia. This grievance was denied. (R.O.A. 347). Petitioner, then filed through the Civil Service Commission an appeal through arbitration. (R.O.A. 340). The arbitrator ruled against Petitioner.

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS PETITIONER'S RIGHT TO FREE SPEECH.

Government employees do not relinquish their First Amendment right to free speech when they enter public service; however, those rights, unlike the citizenry-at-large, are subject to the state's interest in promoting the efficiency of the pubic services it performs. *Hughes v. Whitmer*, 714

F.2d 1407 (8th Cir. 1983). In *Pickering v. Board of Education*, this Court set out a two-fold test to determine whether a government employer may place limits upon its employee's right to free speech pursuant to the First Amendment of the United States Constitution. 391 U.S. 563, 568, 88, S.Ct. 1731 (1981); *Vojvodich v. Lopez*, 48 F.3d 879, 884-885 (5th Cir.), *cert denied*, 116 S.Ct. 169 (1995). As a threshold matter, the employer must establish that his speech related to matters of public concern. *Vojvodich*, 391 U.S. at 884. This determination is a question of law to be resolved by the court. *Coughlin v. Lee*, 946 S.W.2d 1152, 1154 (5th Cir. 1991). Once the employer establishes that the speech at issue involves a matter of pubic concern, the burden shifts to the employer to establish that its interest in promoting the efficient management of its operations outweighs the employee's First Amendment rights. *Id.* at 885.

Consequently, governmental employers may legitimately curtail the free speech rights of their employees to promote efficiency, loyalty and departmental morale, **provided only that these interests outweigh the employees' right to free speech.** *Id.* [emphasis added]. In other words, in determining whether Chief Nuchia's reprimand infringed upon Petitioner's speech, a balance must be struck against HPD's interest in promoting efficiency, discipline and morale. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). To strike this balance, the court must consider the nature of the employment relationship and the nature of the speech activity involved. *Pickering*, 391 U.S. at 569-73. Due to the varying circumstances of each employee's situation, the court must look to each employee's particular facts making a decision on a case-by-case basis. *Vojvodich*, 48 F.3d at 885.

After the District Court correctly determined that

Petitioner's speech was a matter of public concern[3], the Fifth Circuit erred in affirming the District Court's conclusion that Petitioner's speech threatened to disrupt the HPD. In *Connick v. Myers*, this Court set out six factors to be weighed in evaluating the particular facts of each case:

> (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close relationship between the employees which might be deteriorated by the speech; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech, and; (6) whether the speech impeded the employee's ability to perform his or her duties. 103 S.Ct. at 1692-93; *United States Department of Justice v. Federal Labor Relations Authority*, 955 F.2d 998, 1005 (5th Cir. 1992).

This balancing test "is not all-or-nothing but rather a sliding scale under which 'public concern' is weighed against disruption." *Vojvodich*, 48 F.3d at 884; *Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988) (quoting *Gonzalez v. Benavides*, 774 F.2d 1295 (5th Cir. 1985), *cert denied*, 106 S.Ct. 1789 (1986). In applying the *Pickering* balancing test, two important considerations which have been noted by the courts must be kept in mind. First, the courts have repeatedly recognized that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Connick*, 461 U.S. at 145. Second, the courts have repeatedly recognized that "a stronger showing of disruption may be necessary if the employee's speech more substantially

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3. The district court concluded that since the *Edwards* consent decree was a matter of public concern and Petitioner's invitation was a comment on the *Edwards* consent decree, Petitioner's invitation was a matter of public concern.

involves matters of public concern." *Id.* Both of these considerations are relevant to Petitioner's case. The Fourth Circuit recently stated that:

> "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply and not yet well-defined." *Cromer v. Brown,* 88 F.3d 1315, 1325 (4th Cir. 1996) (quoting *DiMeglio v. Haines,* 45 F.3d 790, 806 (4th Cir. 1995). "But we did not say that a public employee's right to speak out on matters of public concern could never be clearly established." *Id.*

With this in consideration, Petitioner concedes that the *Pickering* balancing test may not be an easy burden to meet, but Petitioner feels strongly that when all the *Connick* factors are properly weighed and all the evidence on the record is properly considered, Petitioner's case is one of those "infrequent" cases where an employee's right to speak on a matter of public concern clearly outweighs its employer's interest in the efficient management of its operations.

By failing to apply all of the *Connick* factors to Petitioner's particular case and by failing to consider all of the evidence on the record, the Fifth Circuit erred in its finding that HPD's interest in promoting the efficiency of its services outweighs Petitioner's interest in disseminating the contents of the invitation. In support of its decision, the Fifth Circuit relied solely on an affidavit of Chief Nuchia. After considering only Chief Nuchia's affidavit, the Fifth Circuit summarily concluded that "Vollert's speech was so offensive,

in the context of his work environment, that it caused, and would continue to cause, a disruption to the work environment." The Fifth Circuit also erred in stating "that Vollert offered no summary judgment evidence showing that his letter did not, or would not, create a disruption." By considering the "invitation" and Chief Nuchia's affidavit in a vacuum, the Fifth Circuit erred by not weighing all of the *Connick* factors in applying the *Pickering* balancing test and by failing to give credence to all of the evidence on the record.

A. Petitioner's Speech Did Not Threaten To Disrupt The Police Department.

The evidence on the record clearly shows that there was no disruption within the HPD's rank and file. More importantly, no creditable evidence exists showing a potential impediment to the HPD's ability to perform its duties efficiently. In considering whether Petitioner's speech impeded the Department's ability to efficiently perform its duties, the Court must "examine whether the speech impairs discipline by supervisors or harmony among co-workers or had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891 (1987). On appeal, Respondents provided scant evidence that Petitioner's speech had a possibility of providing even potential disruption.

Evidence that two officers (out of a total of 4,800 officers), Matt Perales and Ignacio Aranda, were allegedly "offended" and "disgusted" by Petitioner's invitation which was sent to a limited number of recipients, namely the twelve HPOA board members, is hardly evidence that discipline by supervisors or harmony among co-workers was in a potential state of impairment. (R.O.A. 379). The fact that an

individual chooses to express his ideas in language some might find offensive is not, in and of itself, enough to override his interest in speaking freely. *Waters v. Chaffin*, 684 F.2d 833 (11th Cir.1982).

Even after Aranda widely publicized Petitioner's invitation in the OSSO newsletter, there was no visible disruption nor did it generate any controversy among the rank and file officers. (R.O.A. 323). Furthermore, Assistant Chief Simmons never detected any disruption causing the Department's efficiency to be hampered, and, in his deposition, Assistant Chief Simmons repeatedly stated that after Petitioner's invitation was published in the OSSO newsletter, he never heard any complaints about the invitation or about Petitioner. (R.O.A. 302-304). Even if any efficiencies had been hampered, it was not because of Petitioner's dissemination of the invitation to a limited number of individuals, but rather a result of Aranda's publication of Petitioner's invitation in the OSSO newsletter.

Contrary to Respondent's proposition that Petitioner's invitation caused concern of potential disruption, the record does not reveal any disruption or potential disruption. No working relationships were adversely effected, Petitioner continued to supervise, and except for Perales and Aranda, there is no evidence of any other officer, either subordinate or superior to Petitioner, that found the invitation "offending" and/or "demeaning." In fact, Assistant Chief Simmons, who reports directly to Chief Nuchia, and Sergeant Craig Ferrell, HPD's legal counsel, believed that Petitioner's conduct was constitutionally protected, and as a result, both of them recommended that the allegations made by Perales and Aranda be "classified as unfounded." (R.O.A. 354).

In *Berger v. Battaglia*, the Fourth Circuit held "[i]t is at least arguable from *Pickering*, its antecedents, and its progeny, that the only public employer interest which will

outweigh a public employee's recognized speech rights is the interest in avoiding **direct disruption, by the speech itself**, of the public employer's internal operations and employment operations." 779 F.2d 992, 1000 (4th Cir. 1985) (emphasis added). In *Berger*, a white police officer, while off-duty, out-of-uniform, and off police premises, dressed up and performed in public as the black entertainer, Al Jolson. The black community took offense when it became known that Berger was a police officer. Because demonstrations and picketing were threatened, the Baltimore Police Commissioner ordered Berger to cease all public performances. Unlike Berger, Petitioner did not "take his show on the road;" Petitioner's audience, an employee union's governing board, was limited and itself greatly involved in the public debate surrounding the Edwards suit.

Finally, Respondent alleges that Chief Nuchia's sole purpose for reprimanding Petitioner was to prevent further disruption. However, if prevention of further disruption was the real reason for disciplining Petitioner, then the delay in administering the discipline, a four month time period between June 29, 1993 and October 8, 1993, did not further Respondent's purposes.

1. **The time, place, and manner of Petitioner's speech entitles it to a higher level of protection.**

Several errors were committed when the District Court held that the time, place, and manner of Petitioner's speech did not entitle it to a higher level of constitutional protection.

First, the District Court erred when it primarily relied upon *Tindle v. Caudell* in holding that the time, place, and manner of Petitioner's speech did not entitle it to a higher

level of protection. 56 F.3d 966 (8th Cir). *Tindle* is inapposite to Petitioner's particular facts. Tindle attended a Halloween party dressed in black face, wearing bib overalls and a black, curly wig, and carrying a watermelon. The issue was whether the costume itself fell under the First Amendment's protection because it came within the ambit of being entertainment. In holding that "Tindle has not shown that his costume related 'to any matter of political, social, or other concern to the community,'" the Eight Circuit concluded that Tindle did not wear the costume to incite debate, to alienate others, **to comment upon an issue**, or even to send a message. *Id.* at 968-970. (emphasis added). In contrast to Tindle, it is clear from the record that Petitioner's invitation was a "comment on an issue" regarding a matter of public concern. Petitioner had on numerous occasions, before sending the invitation to the HPOA board members, expressed his dissatisfaction with the Edwards consent decree. (R.O.A. 318-319).

Also inapposite to Petitioner's facts, Tindle, in wearing the custom, did cause more than a few adverse consequences at work. The Eighth Circuit particularly noted that the Chief of Police was concerned about possible racial friction or disharmony within the department, and was aware of **existing racial divisions** among the officers. *Id.* at 966 (emphasis added). The Eight Circuit found that the evidence in the record indicated that **potential disruption was real**, including Tindle's own testimony agreeing that his conduct had caused "quite a bit of controversy at the Police Department." *Id.* at 972. (emphasis added).

In Petitioner's case, Petitioner placed a personal and private invitation in the mailboxes of twelve board members of the HPOA, a police officers union completely detached from the Police Department, while on union property, off-duty and out of uniform. (R.O.A. 318). He did not intend to

widely publicize the invitation, and but for Aranda's publication of the invitation in the OSSO newsletter, only a limited number of individuals would have ever seen the invitation. Of those twelve members, only one board member, Perales, was offended. Perales, instead of utilizing the proper channels for his grievance, went directly to the President of OSSO, Ignacio Aranda. Because Petitioner's case is inapposite to Tindle, in that Petitioner's spoke out on an issue regarding a matter of public concern which did not cause any disruption or potential disruption in the department, Petitioner' speech is entitled to a higher level of constitutional protection.

The District Court further erred in concluding that the invitation's wide distribution made it likely that the invitation would reach additional officers and the general public. Petitioner sent the invitation to only twelve HPOA board members, one of whom was Perales. It was Perales who initiated the widespread dissemination of the invitation by enlisting Aranda's aid. Aranda, in turn, completed the widespread publication by printing the invitation in the OSSO newsletter. (R.O.A. 323). Even after Aranda's publication of the letter, there was no visible disruption or possible disruption. (R.O.A. 294-295). Therefore, even if there had been inefficiencies which hampered the operations of the department, the inefficiencies were not caused by Petitioner's dissemination of the invitation to a limited number of individuals, but rather a direct result of Aranda's publication of Petitioner's invitation in the OSSO newsletter.

Finally, the District Court erred in summarily disregarding Petitioner's reference to *Waters v. Chaffin*, 648 F.2d 833 (11th Cir.). In *Waters v. Chaffin*, the Eleventh Circuit, in reversing the District Court, held that the officer could not be disciplined for calling his Police of Chief vulgar names when the officer was off-duty, out of uniform, not on

the department grounds, and spoke to a person he considered a friend. *Id.* The Eleventh Circuit held, "[b]ecause we do not think that the department has made a showing of actual harm or a reasonable likelihood of harm to its efficiency, discipline, or harmony, we believe that the First Amendment protects this example of 'the American tradition of making passing allusion of the vicissitudes of the boss.'" *Id.* at 840; See also *Yoggerst v. Steward,* 623 F.2d 35, 40 (5th Cir. 1980). Similar to *Waters,* the record in Petitioner's case indicates that the time, place, and manner of Petitioner's speech were factors that contributed to the invitation's lack of or almost total absence of disruption or potential disruption. Therefore, like in *Waters,* Petitioner's speech is entitled to a higher level of constitutional protection.

2. **Petitioner's speech did not impede his ability to perform his duties.**

The District Court erred in summarily concluding that Petitioner's speech impeded his ability to perform his duties. The essence of the District Court's brief argument that "the use of racial jokes could cause fellow officers to lose respect for the sergeant, necessary for efficient and effective operation of the police department." (Appendix at 4). In *Berger v. Battaglia,* the Fourth Circuit stated, "In the balancing process, the only significance the particular content of the speech has is in the degree to which it tends to jeopardize the public employer's capability to perform its duties effectively and efficiently." 779 F.2d 992, 1000 (4th Cir. 1985); See also, *Connick,* 103 S.Ct. at 1693. In Petitioner's case, the District Court did not find that Petitioner's speech impeded his ability to perform his duties. Petitioner was permitted to and still retains a supervisory position with HPD. The record indicates that Petitioner continued to supervise, and except for Perales and Aranda, there is no evidence of any other officer, either subordinate

or superior to Petitioner, who found the invitation "offending" and/or "demeaning." (R.O.A. 354).

In *Rode v. Dellarciprete*, a case extremely similar to Petitioner's case, the Third Circuit held that the First Amendment protected a white officer's right to complain about alleged racial discrimination in the department's reorganization. , 845 F.2d 1195 (3d Cir. 1988). In balancing Rode's interests against the right of her employer to promote the efficiency of the public services it rendered through its employees, the court paid particular attention to any disruption in the department and Rode's ability to continue to perform her duties where close working relationships were involved. *Id.* at 1201-1202. Neither factor heavily outweighed Rode's First Amendment right to free speech.

3. **Petitioner's speech did not impede the harmony of the police department.**

The District Court subtly shifted its focus from the "defecation of controversy and disruption" to "the need for harmony in the work place" allowing it to again utilize the Eight Circuit case, *Tindle v. Caudell,* which Petitioner has already proven inapposite to the particular facts of his case. In relying on *Tindle,* the District Court erred in suggesting that Petitioner's speech caused disharmony in the department. In fact, there is no indication in the record showing disharmony or threatened disharmony in the department.

More importantly, however, the District Court erred in not recognizing that Respondent utilized "threatened disharmony" to suppress and chill Petitioner's right to speak out against the *Edwards* consent decree and its after effects. The record clearly suggests that Perales, Aranda, and

Respondent's true desire was to stifle Petitioner's outspoken views regarding the *Edwards* consent decree. Respondent hides its true motive for stifling Petitioner's speech under the notion of concern for the harmony and efficiency of the department.

II. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN NOT ADDRESSING THAT THE TRUE MOTIVE BEHIND RESPONDENT'S REPRIMAND WAS TO EFFECTIVELY CHILL AND SUPPRESS PETITIONER'S SPEECH.

Both at the trial level and on appeal, Petitioner raised a serious question regarding what Respondent's true motivation was in reprimanding Petitioner. Petitioner, who was a board member of the HPOA, was effectively and totally precluded from commenting on the *Edwards* lawsuit unless his comments were either favorable or so nebulous as to be meaningless. Both the District Court and the Fifth Circuit seriously erred in not addressing the issue which has already been found to be untenable in a free society. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332 (1958). The First Amendment precludes government from interfering with a pubic employee's free speech rights such that government indirectly achieves a result which it could not have achieved directly. *Id.*

In *Eiland v. The City of Montgomery,* the Eleventh Circuit in overturning the trial court, stated:

> "This concern is associated with the paramilitary nature of a police department and the need to preserve departmental respect and discipline. But the need for discipline as an abstract concern should not be allowed to overshadow individual interest in free speech unless the department's true interest in

> suppressing the speech in this regard can be isolated and verified."

797 F.2d 953, 959 (11th Cir. 1986).

The Eleventh Circuit was unmoved by argument that disruption, real and potential, justified the demotion of a corporal to the rank of police officer for registering his dislike of an incumbent mayor's politics by way of a satiric poem. The Eleventh Circuit noted that Eiland's speech dealt with a political campaign, thus a very high showing of potential disruption was necessary. Similar to the intended effect in Eiland's demotion, Respondent's true interest in suppressing Petitioner's speech was to effect indirectly what it could not command directly. Clearly Chief Nuchia could not have commanded Petitioner to cease registering his verbal dissatisfaction with the *Edwards* consent decree within the HPOA's headquarters.

After the allegedly offensive incident, Respondent accomplished placing Petitioner under the threat of sanction for some five months. Five months later, Respondent finally delivered on that threat. It is important to note that two months elapsed between Petitioner's delivery of the invitation and the official initiation of the investigation. Three more months passed before Petitioner received his reprimand. Petitioner's actual reprimand occurred long after any disciplinary action designed to deal with an immediate disruption would have been effective. These time lapses raise significant doubt as to Respondent's true rationales for punishing Petitioner.

In instances were disruption is immediate, reaction by government should necessarily be immediate. See *Harper v. Crockett,* 868 F.Supp. 1557 (E.D. Arkansas--Little Rock Div. 1994). "[A] long delay between the incident and the notice

of discharge belies the argument that the comments actually had an adverse effect on the department." *Waters*, 684 F.2d at 839. "The reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline." *Id.* The absence of facts showing a reasonable possibility of adverse harm to the department serves to confirm that the motive behind Respondent's reprimand was really to chill and stifle Petitioner's criticism of the *Edwards* consent decree.

The Fifth Circuit's affirmation of the District Court's decision delivers a disturbing message to police officers and government employees. Any police chief may effectively suppress speech articulated in a union hall if the right magic words or phrases are articulated to support a disciplinary action. If politically adverse or uncomfortable criticism is directed toward HPD's policies or decisions, then Respondent need only chant "potential disruption" to justify any disciplinary action necessitated to suppress the speech. An even more disturbing message is conveyed in the holding that fellow employees who also know the magic words and phrases can ruin careers and inconvenience their peers by enlisting the government's assistance in suppressing, chilling, and punishing those who exercise their legitimate rights under the First Amendment.

III. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO GIVE WEIGHT TO THE CONTEXT IN WHICH PETITIONER'S DISPUTE AROSE AND THE DEGREE OF PUBLIC INTEREST IN PETITIONER'S SPEECH

Because Petitioner's speech involved a matter of public concern, we must now balance Petitioner's interest in

disseminating the invitation against Respondent's interest in maintaining an efficient workplace. *Pickering*, 391 U.S. at 568. In the initial analysis of the efficient operations of the department, it is important to note that interests of the community also weigh in the balance. *Piver v. Pender County Bd. of Educ.*, 487 U.S. 1206, 108 S.Ct. 2847 (1988).

In *Cromer v. Brown*, the Fourth Circuit held the interests to be balanced under *Pickering* weighed so heavily in Cromer's favor that his right to speak about perceived racial discrimination was clearly established. 88 F.3d at 1326. See also, *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988). In *Cromer*, the effectiveness of a major law enforcement agency was being called into question. The public has a fundamental interest in effective law enforcement organizations that are free of discrimination. *Id.* Thus, the Fourth Circuit held that Cromer's individual interests merged with those of the community at large and those merged interests are substantial.
"For a police force to be effective it must have the respect and support of the community as well as its officers; our system of government demands that support be garnered through informed evaluation of circumstance, and not through the suppression of dissent." *Leonard v. City of Columbus*, 705 F.2d 1299, 1305 (11th Cir. 1983). Accordingly, the public has a keen interest in assuring that its police officers are free to speak up about any broad-based discrimination in their agencies. *Cromer*, 88 F.3d at 1326. After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 1887 (1994).

Cromer is exactly similar to Petitioner's case.

Petitioner's speech concerned HPD's recent practices and policies concerning racial discrimination in its own department. When Petitioner's interest are merged with the interest of the community at large in ensuring an effective police force, the scale tilts heavily in Petitioner's favor. Petitioner's speech regarding internal perceptions of racial discrimination in a law enforcement agency must be given great weight considering the community at large also shares heavily in that interest.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with the overwhelming weight of the evidence and similar cases decided by the Third, Fourth, Fifth, Eighth and Eleventh Circuits. The conflicts are irreconcilable.

For the foregoing reasons, Petitioner respectfully requests this Court grant his Petition for a Writ of Certiorari, vacate the Fifth Circuit Court of Appeals's judgment, and remand for further consideration.

Respectfully submitted,

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APPENDIX

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May 17, 1993

I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice respects to chose who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

Johnie Vollert

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SERGEANT JOHNIE A. VOLLERT,	§	
Plaintiff,	§	
vs.	§	ACTION NO. H-95-674
CITY OF HOUSTON, TEXAS	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before this court is a motion for summary judgment filed by defendant, the City of Houston ("the City") (Docket Entry No. 13). Plaintiff Johnie A. Vollert ("Vollert") alleges that the Houston Police Department ("HPD") violated his First Amendment right to free speech by issuing Vollert a written reprimand in retaliation for his speaking out on a matter

of public concern. Based on the pleadings, motions, submissions, and applicable law, this court GRANTS the City's motion, for the reasons stated below.

I. Background

The relevant facts are undisputed. In December 1992, the city entered into a consent decree that settled a lawsuit styled *Edwards v. City of Houston*, Civil Action No. H-92-2510, in the Southern District of Texas. The plaintiffs in that lawsuit alleged that HPD discriminated against minorities in hiring and promotions. The consent decree required the City to promote certain officers and to determine whether questions on promotion tests were racially biased by analyzing the test results. Questions determined to be racially biased were to be eliminated from the test results and the applicants' scores were to be adjusted accordingly.

On March 5, 1993, Vollert took the promotion

examination for the rank of sergeant. In May 1993, Vollert was elected a board member of the Houston Police Officers Association (HPOA). During the spring of 1993, Vollert was a vocal opponent of the consent decree in HPOA board meetings.

In May 1993, HPD promoted Vollert to sergeant. On May 17, 1993, Vollert placed a written invitation in the HPOA mailboxes of the fourteen other HPOA board members. The invitation stated as follows:

> I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast comer of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice [sic] respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.
>
> (Docket Entry No. 15, Ex. 1).

On October 9, 1993, HPD issued Vollert a written reprimand for distributing the invitation. The written

reprimand stated, in relevant part as follows:

> Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, 1993. Although the correspondence was distributed to a limited number of co-workers, you used poor judgment by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.
>
> It has been determined that, by your actions, you have violated the following:
> HOUSTON POLICE DEPARTMENT RULES MANUAL
> Section(s) 2.3 - Conduct and Behavior
> 3.1 - Respect for Fellow Officers
> 4.2i - Use of Racial Jokes and Slurs

(Docket Entry No. 15, Ex. 10).

Vollert appealed the reprimand to a third party hearing examiner pursuant to Tex. Loc. Govt. CODE ANN. § i43.1016 (Vernon Supp. 1996).

On September 29, 1994, the examiner upheld the reprimand but ordered that the reprimand be removed from Vollert's file three years after the date of its issuance if Vollert received no

additional disciplinary actions during that time period. (Docket Entry No. 13, Ex. 12, Attachment 2).

Vollert filed this lawsuit on March 6, 1995, alleging that the City violated 42 U.S.C. § 1983 by infringing on Vollert's First Amendment rights. The City seeks summary judgment that, as a matter of law, its actions did not violate the Constitution.

II. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56. Under FED. R. Civ. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Nonnan v. Apache Corp.*, 19 F.3d 1017, 1023 (5th

Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. Little, 37 F.3d at 1075.

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2553-54).

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all

justifiable inferences are to be drawn in his *favor." Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2513. "Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S.Ct. at 2552).

III. The City's Motion for Summary Judgment

The Fifth Circuit has explained the test for determining the limits

that a government employer may place on its employees' speech rights

as follows:

> [T]he scope of a public employee's First Amendment rights must be determined by balancing the "interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *[Pickering v. Board of Education*, 391 U.S. 563, 569, 88 S. Ct. 1731) 1734 (1968)1; *Connick v. Myers*, 46i U.S. 138,

142) 103 S. Ct. 1684) 1687, 75 L. Ed.2d 708 (1993). First, the employee must establish that his speech involves a matter of public concern. *Coughlin v. Lee*, 946 F.2d 1152, 1154 (5th Cir. 1991). Whether speech addresses a matter of public concern is to be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-49, 103 S. Ct. at 1690. This determination is a question of law to be resolved by the court. *Coughlin*, 946 F.2d at 1152. If the speech at issue involves a matter of public concern, and is thus protected by the First Amendment, the employer then must show that its interest in promoting the efficiency of the services provided by its employees outweighs the employee's interest in engaging in the protected speech. *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691; *Rankin v. McPherson*, 483 U.S. 378, 388-89, 107 S. Ct. 2991, 2899, 97 L. Ed.2d 315 (1987). "[The State's burden in justifying a particular [action or policy] varies depending upon the nature of the employee's expression." Connick, 461 U.S. at 150, 103 S. Ct. at 1692. "The more central a matter of public concern the speech [or association] at issue, the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin*, 946 F.2d at 1157. The determination of the appropriate balance is also a legal determination to be made by the court. *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691.

United States Department of Justice v. Federal Labor Relations Authority, 955 F.2d 999, 1005 (5th Cir. 1992).

"Only if the court finds that the employee's First Amendment rights outweigh the government's interest in the effective provision of public services does the fact-finder proceed to consider the separate issue of causation." *Coughlin v. Lee*, 946 F.2d at 1152.

The City argues that the written reprimand did not violate Vollert's First Amendment rights because the invitation Vollert sent did not involve a matter of public concern, or, in the alternative, because HPD's interest in promoting the efficiency of its services outweighed Vollert's interest in sending the invitation.

A. Speech on a Matter of Public Concern

"Issues rise to the level of public concern if an individual speaks primarily in his role as a citizen rather than as an employee, or if the information conveyed is of relevance to the public's

evaluation of the performance of governmental agencies. *Coughlin*, 946 F.2d at 1157. - "However, if the employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Thompson v. City of Sackville, Miss.*, 901 F.2d 456, 461 (5th Cir. 1990).

In a memorandum to Chief of Police Sam Nuchia, Vollert described the invitation as follows:

> The letter was a tongue-in-cheek invitation meant only for members of our board. At no time did I intend this letter to be public or go beyond the above stated scope nor did I facilitate it [sic] distribution in any manner.

(Docket Entry No. 13, Simmons Affidavit, Ex. 4). Vollert also claims that the invitation showed his disagreement with the *Edwards* consent decree.

The hearing examiner noted that one of Vollert's witnesses described the invitation as satirical, without

socially redeeming value, and not a serious contribution to public discussion of the *Edwards* lawsuit. (Docket Entry No. 13, Attachment 2). At the time Vollert sent the invitation, the *Edwards* lawsuit had already been settled.

In Rankin v. McPherson, 107 S. Ct. 2891 (1987), an employee claimed she was discharged in violation of her First Amendment rights for. stating, after an attempt on the president's life, "if they go for him again, I hope they get him." The statement was made in the course of a conversation about the policies of the president's administration. The Supreme Court concluded that, in the context described, the statement was a matter of public concern, noting that the inappropriate or controversial character of a statement is Irrelevant to the question whether it deals with a matter of public concern." *Id.* at 2898.

Police officers had widely discussed the *Edwards* consent decree, and Vollert had previously discussed the

decree with the HPOA board members. Given this context, Vollert's invitation was, in part, a comment on the *Edwards* consent decree. Police Chief Nuchia appears to agree that through the invitation, Vollert intended to comment upon the *Edwards* consent decree. (Docket Entry No. 13, Attachment 3, 1 4). The *Edwards* consent decree was a matter of public concern; Vollert's invitation commented on a matter of public concern.

B. Balancing BPD's and Vollert's Interests

Because Vollert's invitation was speech on a matter of public

concern, the court must decide whether HPD's interest in the efficient management of its operations outweighs Vollert's interest in the speech. *United States Department of Justice,* 955 F.2d at 1005.

The Picketing balance requires a court to decide each claim on a case-by-case basis, giving full consideration to the government's interest in efficient public service. *Connick v.*

Myers, 103 S. Ct. 1684, 1691-92 (1983). The factors to be weighed include: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties. Id. at 1692-93; *United States Department of Justice*, 955 F.2d at 1006.

A court must accord to the government the wide degree of discretion necessary for the proper management of internal affairs and personnel decisions. *Connick*, 103 S. Ct. at 1692 *(citing* Amer. v. *Kennedy*, 94 S. Ct. 1633, 1651 (1974)). The degree of discretion varies with the nature of the employee's duties and the legitimate needs of the government.

Pickering, 88 S. Ct. at 1735.

The Fifth Circuit requires an examination of whether the speech: (1) was likely to generate controversy and disruption; (2) impeded the public agency s general performance and operations; and (3) affected working relationships necessary to the agency's proper functioning. *Davis v. Ector County, Tex.*, 40 F.3d 777, 783 (5th Cir. 1995). The balancing test "is not all-or-nothing but rather a sliding scale under which 'public concern' is weighed against disruption: '[a] stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern.'" *Matheme v. Wilson, 851* F.2d 752, 761 (5th Cir. 1988) (quoting *Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 1789 (1986)).

1. The Need for Harmony in the Work Place

"The need for harmony and close working relationships

between coworkers in a police department is of great importance." *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995); *see also Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1994). A police department's interest in developing discipline, *esprit de corps*, and uniformity within its ranks, so as to insure the safety of persons and property, is substantial and greater than the interest of the typical government employer. *Hughes*, 714 F.2d at 1419.

Vollert claims that a disputed question of fact exists as to whether his invitation disrupted HPD operations or generated controversy. A showing of actual disruption, however, is not required. *Tindle*, 56 F.3d at 972; *Shands v. City of Kennett*, 993 F.2d 1337, 1344-45 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 880 (1994). The police department "need not allow events to unfold to the extend that the disruption of the office and the destruction of working

relationships is manifest before taking action." *Tindle*, 56 F.3d at 972. Instead, the court should "look to the facts as the employer *reasonably* found them to be." *Waters*, 114 S. Ct. at 1889. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than many government employers. *Tindle*, 56 F.3d 966, 971 (8th Cir. 1995); *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1409 (8th Cir. - 1990). A police department's determination that an officer's speech is disruptive is entitled to considerable deference. *Hughes*, 714 F.2d at 1419. A police department's discretionary decision to discipline an officer whose speech has contributed to disruption is similarly entitled to considerable deference. *Id.*

Officer Matt Perales ("Perales") was one of the HPOA board members who received Vollert's invitation. Perales's

"immediate response to this appalling letter was of disgust." (Docket Entry No. 8). Perales showed the invitation to Officer Ignacio Aranda, president of the Organization of Spanish Speaking Officers ("OSSO").

By letter dated May 26, 1993, Aranda complained about the invitation to Doug Elder, president of HPOA, describing the invitation as "racially biased," "demeaning," "in poor taste," and "offensive not only to OSSO but to all minorities of the Houston Police Department." (Docket Entry No. 15, Ex. 2). By letter dated June 7, 1993, Aranda complained about the invitation to Chief Nuchia. The OSSO June 1993 newsletter featured an article written by Aranda which described Vollert's invitation as demeaning, in poor taste, and offensive. (Docket Entry No. 19). The article called for Vollert's resignation as a board member of HPOA and encouraged officers to speak out against "[t]his type of attitude and racial bias."

HPD disciplined Vollert based on the belief that racial jokes and slurs are demeaning and embarrassing to fellow officers and likely to deteriorate department efficiency. (Docket Entry No. 13, Nuchia Affidavit, Attachment 3). The contents of the invitation elicited a strong and well-publicized response from minority officers. HPD found that Vollert's invitation was demeaning to fellow officers, embarrassing to the department, and of a nature that could be considered a racial slur or to be racially motivated. HPD concluded that Vollert's invitation violated department regulations governing the conduct and behavior of an officer, respect for fellow officers, and the use

of racial jokes and slurs. HPD and the hearing examiner agreed that Vollert's invitation had the potential to disrupt the efficiency of HPD. (Docket Entry No. 13, Attachment. 2, page 30 and Attachment 3, Nuchia Affidavit). As a sergeant

in HPD, Vollert works closely with minority officers. Chief Nuchia issued the reprimand to Vollert to prevent further disruption in the department. *Id.*

The undisputed facts show that HPD's concern that Vollert's invitation would disrupt the efficient operation of the police department had a. reasonable basis. *Tindle*, 56 F.3d at 972. HPD's interest in efficiently managing its operations outweighs Vollert's interest in the speech at issue.

2. The Time, Manner, and Place of the Speech

Vollert argues that his speech is entitled to a heightened level of protection because he wrote the invitation while off-duty, out of uniform, and not on police property. Vollert relies on *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982), in which a police officer challenged a demotion for having called the police chief vulgar names. The Eleventh Circuit held that the officer could not be disciplined because he was off-duty, out of uniform, in a bar away from the department's

jurisdiction, and having a private conversation with one person he considered a

friend. 684 F.2d at 837.

In Tindle, a white police officer was suspended for attending a Halloween party at a police union lodge dressed in black face, wearing bib overalls and a black curly wig, and carrying a watermelon. 56 F.3d at 968. The Eighth Circuit upheld the suspension even though the officer was off-duty and in a private setting, noting that other officers and guests witnessed his appearance.

In this case, Vollert sent his invitation to fourteen other officers. The invitation's wide distribution made it likely that the invitation would reach additional officers and the general public. *Shands*, 993 F.2d at 1346. The invitation was to an official function, a promotion ceremony. The time, place, and manner of the speech do not entitle it to a higher level of protection.

3 Whether the Speech Impeded Vollert's Ability to Perform His Duties

It is undisputed that as a police sergeant, Vollert works closely with minority officers. In disciplining Vollert, HPD relied on its experience that a sergeant's use of racial jokes causes fellow officers to lose respect for the sergeant, necessary for efficient and effective operation of the police department. Although the record is unclear as to whether Vollert's speech actually impeded his ability to perform his duties, an employer need not demonstrate that the employee's speech did impede him from performing his job responsibilities. *Connick*, 103 S.Ct. at 1692; *Shands*, 993 F.2d at 1346.

Considering the *Connick* factors together, this court concludes that HPD's interest in promoting the efficiency of its services outweighs Vollert's interest in disseminating the contents of the invitation.

IV. The Preclusive Effect of the Hearing

Examiner's Decision

The City contends that the hearing examiner's decision precludes Vollert from asserting non-constitutional issues in federal district court. (Docket Entry No. 13, page 10-11). The City contends that although Vollert is not precluded from raising constitutional claim, the court should give the hearing examiner's decision rejecting those claims great weight. Vollert argues that the arbitrator's decision is not binding because it was based on constitutional issues, relying on *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1136 & n.3

(5th Cir. 1991).

Vollert appealed the written reprimand to the hearing examiner pursuant to TEX. LOC. GOVT. CODE ANN. § 143.1016 (Vernon Supp. 1996), which provides, in relevant part, as follows:

(a) . . . the appealing fire fighter or police officer may elect to appeal to an independent third party hearing examiner instead of to the commission. . . .
(c) The hearing examiner's decision is final and binding on all parties. If the fire fighter or police-officer decides to appeal to an independent third party hearing examiner, the person automatically waives all rights to appeal to a district court except as provide by Subsection (j).
(j) A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration or that the order was procured by fraud, collusion, or other unlawful means.

This court finds it unnecessary to decide whether the hearing examiner's decision precludes Vollert from banging some or all of his claims in this court. Reviewing all of Vollert's claims, HPD's decision to reprimand Vollert for the statements in his invitation did not violate Vollert's First Amendment rights.

V. Conclusion

This court GRANTS the City's motion for summary judgment.

SIGNED on _____, 1996, at Houston, Texas.

_____
Lee H. Rosenthal

United States District Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-20341

JOHNIE VOLLERT,

Plaintiff-Appellant,

versus

CITY OF HOUSTON, ET AL.,

Defendants,

CITY OF HOUSTON,

Defendant-Apppelle

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-95-674)

Before HIGGINBOTHAM, EMILIO M. GARZA, and DEMOSS, Circuit Judges.
PER CURIAM:*

The district court granted summary judgment in favor of Defendant/Appellee the City of Houston because Plaintiff/Appellant Johnie Vollert failed to raise a genuine fact issue concerning his claim that the Houston Police Department violated his First

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Amendment rights when it issued a written reprimand in response to racially-oriented speech which Vollert published to other officers. We affirm.

BACKGROUND

In December 1992, the City of Houston (the "City") entered into a consent decree that settled **Edwards** ***v. City of Houston.***[1] In ***Edwards-ds,*** the plaintiffs alleged that the

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1. For a discussion of the consent decree in this unpublished case, see the decision of the United States Court of Appeals

Houston Police Department (HPD) discriminated against minorities in hiring and promotions. The consent decree required the City to promote certain minority officers and to determine whether questions on promotion tests were racially biased. Questions determined by the City to be racially biased were to be eliminated from the test results and the applicants' scores were to be adjusted accordingly.

On March 5, 1993, Vollert took the promotion examination for the rank of sergeant. In May 1993, Vollert was elected as a board member of the Houston Police Officers Association (HPOA) At board meetings, Vollert was a vocal opponent of the **Edwards'** consent decree.

In May 1993, the HPD promoted Vollert to sergeant. On May 17, 1993, Vollert placed the following invitation (written on HPOA stationary) in the HPOA mailboxes of his 14 co-

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for the Fifth Circuit in **Edwards v. City of Houston,** 78 F.3d 983 (5th Cir. 1996).

HPOA board members:

> I will be getting promoted (despite my race) on May 24, 1993 at 1:30 pm at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shepherd. You are cordially invited to attend and give proper and justice [sic] respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

One of the recipients of this letter was Ignacio Aranda, President of the Houston Police Organization of Spanish Speaking Officers (OSSA) Aranda was upset with the racial content of the letter and wrote a letter of protest to both the President of the HPOA, Doug Elder, and the Chief of Police, Sam Nuchia. The contents of the letter became widely known and elicited a strong and well publicized response from the minority officers.

On October 8, 1993, the HPD issued Vollert a written reprimand for distributing the invitation. The reprimand stated, in relevant part:

Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, *Al* 1993. Although the correspondence was distributed to a limited number of co-workers, you used poor judgment by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.

It has been determined that, by your actions, you have violated the following:

HOUSTON POLICE DEPARTMENT RULES MANUAL

Section(s) 2.3 - Conduct and Behavior
3.1 - Respect for Fellow officers
4.21 - Use of Racial Jokes and Slurs

Vollert appealed the reprimand to a third party hearing examiner pursuant to Tex. Loc. Gov't Code Ann. § 143.1016 (Vernon Supp. 1996) . On September 29, 1994, the examiner upheld the reprimand but ordered that the reprimand be removed from Vollert's file three years after the date of its issuance if Vollert received no additional disciplinary actions during that time.

Vollert filed this lawsuit on March 6, 1995, alleging that the City violated 42 U.S.C. § 1983 by infringing upon Vollert's First Amendment rights. The district court granted summary judgment in favor of the City holding that, while Vollert's speech was a matter of public concern, it was not entitled to First Amendment protection because, as a matter of law, under the facts of this case, the HPD's interest in the efficient management of its operations outweighs Vollert's interest in the speech Vollert now appeals.

DISCUSSION

As always, we review the district court's order granting summary judgment de *novo*. **Lee *v.* *Wal-Mart Stores Inc.*,** 34 285, 288 (5th Cir. 1994). Summary judgment is appropriate where the record, taken as whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56 (c)

The test used for determining whether a government employer may place limits upon its employee's speech is set forth in ***Vojvodich v.*** Lopez, 48 F.3d 879, 884-885 (5th Cir.), cert. denied, 116 S. Ct. 169 (1995) "To assert the protections of the First Amendment, the employee must establish, as a threshold matter, that his speech or activity related to a matter of public concern." **Id.** at 884. If the employee meets this burden, the employer then must establish that its interest in promoting the efficient services provided by its employees outweighs the employee's interest in engaging in the protected activity. **Id.** at 885 (citing **United *States Dept. of Justice*** v. Federal ***Labor Relations*** Authority, 955 F.2d 998, 1005-1006 (5th Cir. 1992)). "This analysis in reality is a sliding scale or spectrum upon which 'public concern' is weighed against disruption." **Id.** at 884. "We have repeatedly recognized that a stronger showing of disruption may be necessary if the employee's speech more

substantially involves matters of public concern." **Id.** at 885 (internal citations omitted) . Because of the wide variety of situations in which this issue might arise, each case should be considered on its particular facts. **Vojvodich,** 48 F.3d at 885.

To aid our evaluation of a given case, we look to the factors discussed by the Supreme Court in ***Connick v. Myers,*** 103 S. Ct. 1684 (1983).

> Although not intended to be the exclusive considerations, these factors include (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern, (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships, (3) the time, place, and manner of the employee's activities, and (4) the context in which the employee's activities were carried out.

Vojvodich, 48 F.3d at 885 (citing **Connick,** 103 S. Ct. at 1694). "A proper consideration of these factors allows a court to balance the plaintiff's interest in the claimed protected activity against the alleged disruption caused by

that activity to the effective and efficient fulfillment of the government's public responsibilities." **Id.**

The district court first determined that Vollert's speech was a matter of public concern. In so finding, the district court stated:

> Police officers had widely discussed the Edwards consent decree, and Vollert had previously discussed the decree with the HPOA board members. Given this context, Vollert's invitation was, in part, a comment on the Edwards consent decree. Police Chief Nuchia appears to agree that through the invitation, Vollert intended to comment upon the Edwards consent decree. The Edwards consent decree was a matter of public concern; Vollert's invitation commented on a matter of public concern.

Having so found, the district court next engaged in a balancing of the HPD' s interests versus Vollert' s interests. Applying the **Connick** factors,[2] the district court held:

2.The district court enumerated the **Connick** factors as follows: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close relationship between the employees which might be deteriorated by the speech; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the

> The contents of the invitation elicited a strong and well-publicized response from minority officers. HPD found that Vollert's invitation was demeaning to fellow officers, embarrassing to the department, and of a nature that could be considered a racial slur or to be racially motivated. HPD concluded that Vollert's invitation violated department regulations governing the conduct and behavior of an officer, respect for fellow officers, and the use of racial jokes and slurs. HPD and the hearing examiner agreed that Vollert's invitation had the potential to disrupt the efficiency of HPD. As a sergeant in HPD, Vollert works closely with minority officers. Chief Nuchia issued the reprimand to Vollert to prevent further disruption in the department.
>
> The undisputed facts show that HPD's concern that Vollert's invitation would disrupt the efficient operation of the police department had a reasonable basis.

The district court concluded that "HPD's interest in promoting the efficiency of its services outweighs Vollert's interest in disseminating the contents of the invitation." In reaching this conclusion, the district court considered an

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degree of public interest in the speech, and; (6) whether the speech impeded the employee's ability to perform his or her duties. *See* **Connick,** *103* S. Ct. at 1694.7

affidavit submitted by Chief Nuchia.[3]

On appeal, Vollert argues that the district court misapplied the ***Connick/Vojvodich*** factors. Specifically, Vollert argues that there is no evidence of any "actual or

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3. Chief Nuchia affidavit states, in relevant part:

> My intent in issuing the written reprimand to Sergeant Vollert was to prevent any further disruption in the efficiency of the Houston Police Department. As a supervisor in the Houston Police Department, Sergeant Vollert will work closely with minority officers and supervisors. It is essential to the operation of the Police Department that all employees maintain the utmost respect for their fellow officers and supervisors and in my opinion and experience racial jokes and slurs detract from that respect. Such behavior is demeaning and embarrassing to fellow officers and is likely to result in a deterioration in the efficiency of the department. The written reprimand issued to Sergeant Vollert was issued to prevent any further such occurrence and to quell the growing resentment within the Police Department created by the publication of the invitation. The basis of the action was not because of the [sic] Sergeant Vollert's criticism of the consent decree but because of the manner in which it was presented.

threatened[4]" disruption of the HPD's daily commitment to protecting Houston's citizens," or to the "working relationships between Appellant and other officers." Vollert contends that Chief Nuchia "extended his authority outside the parameters of his jurisdiction when he reached into a private union hall to punish Appellant's speech...."

In support of its position, the City offered, *inter alia*, the affidavit of Chief Nuchia which specifically states that Vollert's speech was so offensive, in the context of his work environment, that it caused, and would continue to cause, a disruption to the work environment. Vollert offered no summary judgment evidence showing that his letter did not, or would not, create a disruption. After carefully reviewing the briefs, the record excerpts, and relevant portions of the record itself, for the reasons stated by the district court, we

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4. Vollert agrees that a showing of actual disruption is not required.

are satisfied that the decision of the district court is not in error. The judgment of the district court is, in all things,

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-20341

JOHNIE VOLLERT

Plaintiff-Appellant

v.

CITY OF HOUSTON ET AL

Defendants

CITY OF HOUSTON

Defendant-Appellee

Filed Feb 13 1997
Charles R. Fulbruge III
Clerk

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, EMILIO M. GARZA, AND DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 12 1997
OFFICE OF THE CLERK

No. 96-1815

In The

Supreme Court of the United States

October Term, 1996

JOHNIE VOLLERT,

Petitioner,

v.

CITY OF HOUSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS VOLLERT'S RIGHT TO DISTRIBUTE TO CO-WORKERS RACIALLY INSULTING INVITATIONS TO A POLICE DEPARTMENT SPONSORED CEREMONY?

PARTIES TO THE PROCEEDING

JOHNIE VOLLERT – Petitioner, a present employee of the City of Houston.

THE CITY OF HOUSTON, TEXAS – Respondent, a municipal corporation.

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STATEMENT OF THE CASE

While Petitioner's statement of the facts of the case (Petition at 2-7) is basically accurate, it contains a significant omission. Petitioner asserts that he "filed through the Civil Service Commission an appeal through arbitration. The arbitrator ruled against Petitioner." (Petition at 7). While this is correct, Petitioner fails to mention that the arbitrator ruled that the written reprimand had to be removed from Vollert's file three years from the date of its issuance if he received no additional disciplinary action during that time period. (Respondent's App. at 37).

REASONS FOR DENYING THE WRIT

Petitioner's argument is moot because the said reprimand has been removed from his file in compliance with the arbitrator's order. He can show no harm for its interim pendency. This case is not one meriting review by this Honorable Court. Petitioner has not established any of the consideration set forth in this Court's Rule 10. The decision rendered by the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN HOLDING THAT THE POLICE DEPARTMENT'S INTEREST IN THE EFFICIENT MANAGEMENT OF ITS OPERATIONS OUTWEIGHS VOLLERT'S RIGHT TO DISTRIBUTE TO CO-WORKERS RACIALLY INSULTING INVITATIONS TO A POLICE DEPARTMENT SPONSORED CEREMONY.

As stated in Vollert's own Petition, he had previously made a number of statements expressing his dissatisfaction with the *Edwards* consent decree. (Petition at 4). Vollert makes no claims regarding any punitive action taken against him for those statements. It was only after he "played the race card" that the Respondent considered his behavior to be detrimental enough to respond and to invoke the disciplinary process. It was the racially biased remarks by Vollert, a supervisor in the Houston Police Department (HPD), which led to an outcry by at least two minority officers, one of whom represented a large number of Hispanic officers employed by the department. (Respondent's App. at 39).

The Court of Appeals for the Fifth Circuit gave proper deference to the Respondent's right to maintain order and discipline within its police department when faced with a question of protected speech versus potential disruption in the work place. Upon weighing the importance of the speech in question,[1] it was clear that the Respondent's interests greatly outweighed Vollert's.

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[1] At best a thoughtless attempt at humor, at worst an outright racial slur. (See Petitioner's App. 1)

Because the written reprimand was issued only for that portion of the speech that was disruptive, it is irrelevant whether the rest of the speech was protected. *Waters v. Churchill*, 511 U.S. 661 (1994).

The clear light of day reveals that Vollert's invitation was simply a backhanded slur against minority officers who were promoted pursuant to the *Edwards* consent decree and explained that *Vollert* (despite his race) achieved his deserved promotion while *they* (those minority officers who would "stand out" at the promotional ceremony) were undeserving of any congratulations.

This changed the character of Vollert's previous attacks from attacks upon policy to a personal attack upon a specific and identifiable group of his co-workers whom he labels as undeserving of their promotions. The fact that this group consisted only of minority members and that his invitation made specific reference to "his race" made this situation a subject of concern within the department. The reasoned, restrained response of a written reprimand to quell any potential disruption and further to place individuals on notice of the dangers inherent in such racially antagonistic actions was properly sustained by the trial court and the court of appeals.

A. Petitioner's Speech Threatened To Disrupt And Impede The Harmony Of The Houston Police Department (HPD).

Vollert based his petition on the premise that evidence on the record shows that there was no disruption within the HPD's rank and file. However, this Court has found that a showing of actual disruption was not

required in the balancing process and that the Respondent need not allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *Connick v. Myers*, 461 U.S. 138 (1983). The District Court specifically found the Respondent's concerns regarding the potential effect of Vollert's racially biased invitation upon the close working relationships in the Police Department to be reasonable and that such concerns outweighed Vollert's interest in disseminating the racial commentary included in the invitation. (Petitioner's App. at 22)

This Court has instructed that lower courts must consider the state's interest in promoting the efficiency of the public services it provides through its employees. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Although the District Courts weigh a number of factors, the Fifth Circuit's inquiry centered on three: (1) was it likely to generate controversy and disruption; (2) did it impede the public agency's operations; and (3) did it affect working relationships necessary to the agency's proper functioning. (Petitioner's App. 15). "A stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern."[2] *Connick*, 461 U.S. at 152.

The basis for the Respondent's concern was that a racially biased invitation, attributable to Vollert, had been

---

[2] While the District Court did find that Vollert's speech was of public concern (Petitioner's App. at 10-13), Respondent asserts that racial jokes and slurs should be given little, if any, weight when balanced against the need for efficiency in a Police Department.

disseminated within HPD by some means. (Petitioner's App. at 1). Vollert's statements in this case were obviously not made in a vacuum but were made to coworkers, at least one of whom was offended by the racial aspects of the message. This Court has said that a "government employer may bar its employees from using offensive utterances to members of the public or to the people with whom they work." *Waters v. Churchill*, 511 U.S. at 672. The growing resentment in the department, as evidenced by the newspaper articles and formal and informal complaints regarding the invitation, was addressed by the issuance of a written reprimand to Vollert informing him that the racial aspects of his invitation were considered improper. (Petitioner's App. at 29-30, 36).

Even if the invitation was meant as a comment upon the *Edwards* decree, it remains true that Vollert was not disciplined for his professed displeasure with the consent decree but for the manner in which he raised this complaint. (Petitioner's App. at 29-30, 36). The objectionable racial overtones included in the invitation are clearly illustrated by the implied phrases "I will be getting promoted (**despite my race**) . . . " and "There will be a number of 'remedial' promotions from the **welfare list**, but they should stand out [because of their race] should you decide to congratulate only those [the whites] who deserve it." [Emphasis added]. This "speech" comprised a back-handed racial joke or slur given little or no protection by the First Amendment and properly discouraged by the Houston Police Department.

Finally, Vollert asserts "if prevention of further disruption was the real reason for disciplining Petitioner,

then the delay in administering the discipline, a four month time period between June 29, 1993 and October 8, 1993, did not further Respondent's purpose." (Petition at 13). While it is obvious that some time passed prior to the problem being brought to the attention of the Department, the Respondent would ask the Court to take judicial notice of Chapter 143 of the Texas Local Government Code which specifically lays out the procedures for an investigation and disciplinary action of a Houston Police Officer. (See, e.g. § 143.123). By its very nature, an Internal Affairs Division investigation into a complaint against a classified officer is a lengthy matter. Suffice it to say that a proper investigation of all aspects of the complaint against Vollert was required under state law and that the Department adhered to the law. (Respondent's App. at 5-7). This passage of time in fact clearly illustrates that the Respondent's action was not a knee-jerk reaction to Vollert's criticism of the *Edwards* consent decree as alleged by Vollert but rather it emphasizes the Respondent's focus upon the racial statements proffered by Vollert rather than the then stale commentary upon the *Edwards* decree.

B. The Time, Place, And Manner Of Petitioner's Speech Do Not Entitle It To A Higher Level Of Protection.

The District Court correctly held that the time, place, and manner of Petitioner's speech did not entitle it to a higher level of constitutional protection. Vollert himself released the "racial slur" genie and now attempts to extract damages from the Respondent for the action it was forced to take in an attempt to place it back into the

bottle. Vollert's assertion that he distributed the racially offensive material off-duty and that he meant the invitation as a comment upon the *Edwards* consent decree, fails to bestow upon the included slurs a higher level of protection. Because of the nature of the invitation[3] (racially offensive) and the individuals he chose to distribute it to (a number of union leaders, at least one of whom was a member of a minority group), it was painfully obvious that the message would not remain private nor did Vollert want it to remain so.

Vollert released an invitation which on its face is insulting and degrading to minorities and to other current police officers and co-workers. Vollert now attempts to cast all blame for his resulting reprimand upon Officer Perales, an original recipient of the invitation, who passed on the insulting comments to his peers. (Petition at 4-5, 15). From there the information was published in the OSSO (Organization of Spanish Speaking Officers) newsletter and eventually brought to the attention of the president of HPOA and the Chief of Police.[4]

While the initial time and place of the invitation appear to be separated from HPD, the manner in which

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[3] Vollert's own witness described the invitation during the arbitration proceeding as satirical, without socially redeeming value, and not a serious contribution to public discussion of the *Edwards* lawsuit which at that time had already been settled. (Respondent's App. at 29.)

[4] It is unclear what "proper channels" Vollert asserts in his petition (at p. 5) that this information should have traveled to reach the Department, but no matter what method was chosen, the insulting wording of his invitation would have remained the same.

the speech was made clearly placed its subject matter into a conflict with Vollert's position as a sergeant in HPD. The individuals to whom the invitation was distributed may have been off duty at the time they received the information but it would be more than disingenuous for Vollert to suggest that his intention and belief were that such information could remain within the confines of the union hall and never make it to his workplace. These individuals were co-workers and leaders (board members) of a Houston Police Department employee group, all of whom were employed by HPD. (Petition at 3)

The degree of discretion afforded to the government for management of its internal affairs and personnel decisions vary with the nature of the employee's duties and the legitimate needs of the government. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In this case, the Respondent's interest in maintaining efficiency in its operations outweighs Vollert's right to make racially degrading comments to his co-workers regarding his peers. *Connick v. Myers*, 461 U.S. at 142. There is wide degree of discretion afforded to government in management of its internal affairs, as noted in *Connick* and *Pickering*, along with the increased need for harmony and close working relationships in a police department. These concerns provide sufficient grounds for the department's determination that the use of racial jokes by a supervisor would adversely affect departmental efficiency, and validate the Respondent's attempt to remedy the situation by the issuance of a written reprimand to Vollert.

Finally, Vollert asserts that his speech did not impede his ability to perform his duties. However, an employer need not demonstrate that the employee's speech did

impede him from performing his job responsibilities. *Connick*, 461 U.S. at 151-152. It is undisputed that, as a police sergeant, Vollert works closely with minority officers. Indeed, he could be assigned to work for one of the Lieutenants who received a "welfare" promotion. In disciplining Vollert, HPD relied on its experience that a sergeant's use of racial jokes causes fellow officers to lose respect for the sergeant, which will necessarily effect the efficient and effective operation of the police department.

II. RESPONDENT'S REPRIMAND TO PETITIONER WAS NOT ISSUED TO CHILL AND SUPPRESS PETITIONER'S SPEECH.

It must be noted that Vollert's invitation contained no personal criticism of the Police Chief. Vollert's invitation was at best a satirical comment upon the promotions under the *Edwards* decree bolstered by racially derogatory comments. These racially biased comments were the sole subject of his written reprimand.[5] While Vollert hypothesizes that the written reprimand was but a part of a diabolic plot to deprive him of his right to comment upon the *Edwards* decree, he simply has provided no evidence of such intent anywhere in the record. In fact, by his own admission, he had made a number of previous verbal attacks upon the decree and yet he raised no allegation of an attempt to chill his speech *until* he laced his criticisms with racially offensive references. It is clear that the basis for the written reprimand is exactly what the reprimand

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[5] The entire text of the Police Chief's written reprimand is quoted in Respondent's Appendix, at p. 5.

indicates on its face: Vollert's racially derogatory statements.

III. PETITIONER'S INVITATION WAS NOT SPEECH ON A MATTER OF PUBLIC CONCERN.

This Court has affirmed the concept that a state's interest in promoting the efficiency of public services must be considered when determining whether employee speech regarding a matter of public concern is protected. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). To determine a state's interest, the following factors should be considered:

> (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern,
>
> (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships,
>
> (3) the time, place and manner of the employee's activities, and
>
> (4) the context in which the employee's activities were carried out.

Connick v. Myers, 461 U.S. at 142 (1983).

To be protected, a government employee's speech must be on a matter of public concern, and the employee's interest in expressing himself on the matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees." *Waters v. Churchill*, 511 U.S. at 668, quoting *Connick v. Myers*, 461 U.S. 142 (1983). The fact that the potential disruption in this case was within the Respondent's Police Department lends even greater weight to the concerns regarding prevention of potential disruptions. If the "speech" were on a matter of public concern, because the Respondent reasonably believed that the manner in which Vollert expressed his invitation had the potential for disrupting the efficiency of HPD,[6] the resulting written reprimand (a minimal form of discipline) was necessary and proper under the First Amendment. The Respondent must have some power to attempt to restrain behavior that detracts from its effective operation. *Waters v. Churchill*, 511 U.S. at 675.[7]

The government has a legitimate interest in maintaining proper discipline in the public service, to the end that its duties may be discharged with efficiency and integrity. *Connick*, 461 U.S. at 150-151, quoting *Ex parte Curtis*, 106 U.S. at 373. Vollert's invitation was considered to be potentially disruptive to the efficient operation of HPD. The courts have consistently given substantial weight to government employer's reasonable predictions of disruption, even when the speech involves a matter of public concern. *Waters v. Churchill*, 511 U.S. at 673. "When close

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[6] Petitioner's App. at 19.

[7] It must also be noted that Vollert has not challenged as unconstitutional HPD rules he was accused of violating and for which he was reprimanded. A Police Department is entitled to deference to its rules of conduct for its officers; it may apply a rule to an officer that could not be applied to a citizen. *Kelly v. Johnson*, 425 U.S. 238, 249 (1976).

working relationships are essential to fulfilling public responsibilities a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers,* 461 U.S. at 151-152.

Even if Vollert's intent was to comment upon a matter of public concern, it is insufficient to provide constitutional protection to **all** of his statements in the invitation. So long as the written reprimand was issued only for the part of the speech that was either not on a matter of public concern or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was protected. *Waters v. Churchill,* 511 U. S. at 681. The written reprimand itself clearly indicates that the conduct being addressed was only the racial remarks included in the invitation and did not concern any attempt by Vollert to comment generally upon the *Edwards* consent decree. (Petitioner's App. at 29-30, 36). Vollert's attempt to intermingle his racial remarks with his intent to comment upon the *Edwards* decree fails to lend protection to those comments because an employee's unprotected statement is not immunized from discipline even when surrounded by protected statements. *Waters v. Churchill,* 511 U. S. at 681. Therefore, as a matter of law, the "speech" that was the object of the discipline was not protected by the First Amendment and the Court of Appeals' judgment should be affirmed.

CONCLUSION

This case presents no significant legal issue. The court below correctly applied this Honorable Court's teachings on free speech and its limits within an employment context. Petitioner offers no unique question of law for review. From the foregoing argument, it is clear that Petitioner's contention is merely wrong.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Page

Arbitration Decision .....Resp. App. 1

(This document was submitted in support of Defendant's motion for summary judgment in the lower court and appears at R. 199-164)

OSSO Newsletter June 1993.....Resp. App. 39

(This document was submitted in support of Defendant's motion for summary judgment in the lower court and appears at R. 217)

IN THE MATTER OF A STEP II GRIEVANCE APPEAL HEARING BETWEEN HOUSTON POLICE OFFICERS ASSOCIATION HOUSTON, TX AND HOUSTON POLICE DEPARTMENT CITY OF HOUSTON HOUSTON, TX	REFERENCE: A 70 390 0002 94 SERGEANT J. A. VOLLERT, STEP II GRIEVANCE EMPLOYEE #84146

Hearing was held at the Houston, Texas office of the American Arbitration Association, 1001 Fannin, Suite 1005, on July 8, 1994, commencing at 9:00 a.m. and ending between 5:30 and 6:00 p.m. The parties gave their permission for the Hearing to be tape recorded, used for educational purposes and submitted for possible publication. The witnesses were sequestered and sworn just prior to testifying. Prior to the close of the Hearing both attorneys and the Appellant were asked if they had anything further to say. All answered in the negative. The Appellant was asked if he felt that he had received a full and fair Hearing and if the Union had adequately represented him. He answered in the affirmative to both questions. The Hearing was considered closed upon receipt of the post-Hearing appeal briefs by the Independent Third Party Hearing Examiner (hereinafter referred to as the Hearing Examiner or H.E.), with the Award due from the Hearing Examiner to the American Arbitration Association on or before 5 October 1994.

HEARING EXAMINER: Dr. Milden J. Fox, Jr., P.E., CMfgE, selected under the procedures of the American Arbitration Association.

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Houston, TX 77251 (713/247-1509)

PRESENT FOR THE PARTIES

Appellant: Officer J. J. Berry, Jr., Accident Div., 1st V.P. HPOA

Cpt. C. V. Tompkins, Captain Jail Division

Officer G. L. Blankenship, Motorcycle Div., Dir #6 HPOA

Officer Mark Clark, Police Officer, Former Pres. of HPOA

Officer J. A. Vollert, Grievant, Patrol Officer at Central Patrol (now a Sgt.)

City: Officer May Walker, President AAPOL, Police Officer Community Services Division

Officer Matias Perales, Police Officer Personnel Div., Former Assistant Director HPOA

Officer Ignacio Aranda, Police Officer, Internal Affairs Division, President OSSO

Assist. Chief Simmons, in charge of Technical Service Command, including the Jail

Lt. E. G. Huhn, Internal Affairs

Captain Jones, ADC

STIPULATIONS

The parties stipulated the following:

1. The grievance is properly before the Independent Third Party Hearing Officer.
2. The Grievant (Appellant) prepared JE-3 (the letter in question).
3. The Grievant (Appellant) distributed JE-3 only to members of the HPOA Board of Directors.
4. JE-3 was brought to the attention of the Chief of Police by the President of the Organization of Spanish Speaking Officers (JE-9).
5. The Grievant (Appellant) held Position 12 on the HPOA Board of Directors at the time JE-3 (the letter) was written.
6. The President of the Organization of Spanish Speaking Officers was not a member of the HPOA Board of Directors at the time JE-3 (the letter) was written and distributed.
7. Officer Perales was a member of the HPOA Board of Directors, and a member of OSSO, at the time JE-3 (the letter) was written and distributed.
8. At the time JE-3 (the letter) was written and distributed, there were three minority voting members of the HPOA Board of Directors, out of a total of 15 voting members.

9. Sgt. Brown, IAD Investigator, permitted the Grievant (Appellant) to read CE-2 & 5 plus he gave the Grievant (Appellant) a copy of JE-9 and asked him to respond to these letters. The Grievant (Appellant) responded to Sgt. Brown's request with JE-6.

STATEMENT OF THE ISSUE

The parties could not agree on a Statement of the Issue, so the Hearing Examiner has set forth the following:

> Did the Houston Chief of Police violate any law, rule or regulation when he issued a letter of written reprimand to the Appellant? If so what, if any, should be the remedy?

GRIEVANCE

The grievance is based on the following letter, written by the Appellant on official HPOA stationery dated May 17, 1993 (JE-1, Exhibit 3).

> I will be getting promoted (despite my race) on May 4, 1993 at 1:30 p.m. at the High School of Law Enforcement. It is located just north of the St. Thomas high school which is on the northeast corner of Memorial and S. Shephard. You are cordially invited to attend and give proper and justice (sic) respects to those who deserve it. There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

On October 8, 1993 the Chief of Police wrote the Appellant the following *Written Reprimand* (JE-1, Exh. 1).

> It is specified that, on or about May 17, 1993, you failed to comply with Houston Police Department rules and regulations regarding CONDUCT AND BEHAVIOR, RESPECT FOR FELLOW OFFICERS, AND USE OF RACIAL JOKES AND SLURS.
>
> Investigation revealed that on the above date, while off duty, you prepared a letter to announce your upcoming promotion to sergeant on May 24, 1993. Although the corresondence [sic] was distributed to a limited number of co-workers, you used poor judgement by including remarks and/or terms in the letter which were demeaning to fellow officers, embarrassing to the Department, and of a nature that could be considered a racial slur or to be racially motivated.
>
> It has been determined that, by your actions, you have violated the following:
>
> HOUSTON POLICE DEPARTMENT RULES MANUAL
>
> Section(s) 2.3 – Conduct and Behavior
> 3.1 – Respect for Fellow Officers
> 4.21 – Use of Racial Jokes and Slurs
>
> Consequently, you should consider this memorandum a reprimand regarding your misconduct, and notice that repetition of such actions will not be tolerated.

The Step II grievance, dated 10-19-93, states the following (JE-1, Exh. 2):

NATURE OF GRIEVANCE:

Matt Perales and Ignacio Aranda claim to be offended by an invitation to my promotion on May 24, 1993. The invitation was distributed to Houston Police Officers Association board members only. Aranda published the content of the invitation to members of the Organization of Spanish Speaking Officers.

Chief Nuchia initiated a complaint and sustained charges of Conduct and Behavior, Respect for Fellow Officers and Use of Racial Jokes and Slurs, resulting in a written reprimand.

The promotion invitation was a private memorandum to fellow H.P.O.A. board members regarding a matter of considerable public concern, the City's settlement of the Edwards lawsuit and subsequent remedial promotions. My satirical comments concerned merit, not race. This discipline violates my First Amendment right to speak out in opposition to the City and/or the Houston Police Department about a matter of public concern.

PROPOSED SOLUTION REQUESTED:

Exoneration of all charges and removal of any reference regarding these allegations from my personnel file for all purposes.

LAWS, RULES, REGULATIONS

HOUSTON POLICE DEPARTMENT RULES MANUAL

The below Sections of the above (JE-1, Exh. 12) are the Sections which the Appellant is charged with violating.

* * *

SECTION TWO: ATTENTION TO DUTY

* * *

2.3 Conduct and Behavior

Officers whether on-duty or off-duty shall follow the ordinary and reasonable rules of good conduct and behavior and shall not commit any act in an official or private capacity tending to bring reproach, discredit, or embarrassment to their profession or the department. Officers shall follow established procedures in carrying out their duties as police officers and employees of the department, and shall at all times use sound judgment.

* * *

SECTION THREE: COOPERATION WITH FELLOW OFFICERS AND AGENCIES

3.1 Respect for Fellow Employees

Officers shall treat other members of the department with respect. They shall be courteous, civil and respectful of their superior officers and associates and shall not use threatening or insulting language.

* * *

SECTION FOUR: RESTRICTIONS ON BEHAVIOR

* * *

4.21 Use of Racial Jokes and Slurs

No officer shall engage in any form of speech likely to be construed as a racial or religious slur or joke, whether in the presence of citizens or of other officers.

TEXAS LOCAL GOVERNMENT CODE

* * *

§143.129 Step II Procedure

* * *

(d) If the proposed solution is not acceptable, the firefighter or police officer may either submit a written request stating the person's decision to appeal to an independent third party hearing examiner pursuant to the provisions of Section 143.057 or . . . Notwithstanding Section 143.057(i), if the firefighter or police officer prevails and the hearing officer upholds the grievance in its entirety, the department shall bear the cost of the appeal to the hearing examiner. If the firefighter or police officer fails to prevail and the hearing examiner denies the grievance in its entirety, the firefighter or police officer shall bear the cost of the appeal to the hearing examiner. If neither party entirely prevails and the hearing examiner upholds part of the grievance and denies part of it, the hearing examiner's fee and expenses shall be shared equally

by the firefighter or police officer and the department.

BACKGROUND

The instant Hearing is between the Houston Police Officers Association (hereinafter referred to as the Association or HPOA) and the City of Houston (hereinafter referred to as the City or Management). The grievance that is being heard involves a Step II grievance filed by Sergeant J. A. Vollert (being represented by HPOA) involving his discipline by way of a Written Reprimand for a letter (invitation to his promotion) he wrote and distributed to members of the HPOA Board of Directors on 17 May 1993. The letter was written on HPOA official stationery (JE-3). The Written Reprimand for the contents of the letter resulted from the reactions and complaints made to the Houston Police Department (HPD) on 6-24-93 (JE-1, Exh. 7) and to the Chief of Police on June 7, 1993 (JE-1, Exh. 9). Who made the complaint of 6-24-93 is unknown, as no name other than the Appellant appears on JE-1, Exh. 7. However, the President of the Houston Police Organization of Spanish Speaking Officers (OSSO) wrote the letter of June 7, 1993 (JE-1, Exh. 9).

As a background to the instant matter, the following are the known events that led to the instant matter.

In 1976 and 1975 respectively two lawsuits were filed in the U.S. District Court for the Southern District of Texas, Houston Division. These were *Comeaux v. City of Houston,* Civil Action No. 76-H-1754, and *Kelley v. Hoffheinz,* Civil Action No. H-75-1536. These lawsuits challenged a variety of allegedly discriminatory practices,

and the *Comeaux* action specifically challenged discrimination in promotional tests. By Order entered on June 18, 1992 in *Comeaux* and *Kelley*, all claims of discrimination not involving promotional examinations were dismissed, and the claims of discrimination involving promotional examinations were limited to promotions for the ranks of Sergeant and of Lieutenant from January 1, 1982 on.

In July 1992, a small group of black and hispanic Houston Police Officers also filed suit in the U.S. District Court for the Southern District of Texas, Houston Division. The basis of the suit was a challenge to the HPD's civil service promotional system. The suit alleged discrimination based upon disparate impact. No intentional discrimination was alleged. The suit was consolidated with the two suits cited above that had been languishing in the courts for almost 17 years.

The City answered the suit and, according to HPOA, appeared prepared to defend the HPD as they had in the previous lawsuits. However, during the latter part of August or early September 1992, the City began settlement negotiations and the draft of what was to become known as the "Edwards Consent Decree." The major police employee groups were neither consulted or informed of the pending settlement which drastically altered the provisions of the promotional system mandated by state civil service pursuant to Tex. Loc. Gov't. Code Chapter 143. According to HPOA, in December 1992, the first notice of the pending consent decree was made public. The outcry of the non-protected members of the HPD was immediate, loud and appeared to be unified. The theme of the cry was generally: "What could be

more fair than the current system?" and, "What can you (employee groups) do to stop this?"

Both major employee groups moved to intervene but were rejected by Judge Lynn Hughes. The denial was allegedly based upon the timeliness of the intervention – the bootstrapped languishing cases made the suit 17 years old. According to HPOA, the original plaintiffs were also denied intervention because they sat on their rights. The Edwards Consent Decree became the law of the HPD promotion system in March 1993, and the Appellant's eligibility list was the first affected by its edicts. The denial of intervention was appealed, according to HPOA, by four prospective intervenor groups, including the two major employee groups, to the U.S. Court of Appeals for the Fifth Circuit. Oral argument was heard on May 31, 1994. The decision of the Fifth Circuit is pending.

This background and the political climate of the time is relevant to the instant Hearing. The Appellant held the rank of police officer during the period prior to May 1993 and, according to his uncontroverted testimony, was diligently studying for the Sergeant Promotional Examination. He was also an elected Director (Position 12) of the HPOA. Thus, according to HPOA, the Appellant was affected by the consent decree both personally and politically.

The proposed settlement of the *Edwards* lawsuit was the topic of local media coverage, as shown by several newspaper articles consisting of JE-1, Exh. 11. The topic was of extreme concern to the rank and file police officers and was discussed daily "on the street" and monthly in

the Associations' Board Meetings. The Director Appellant and a unanimous Association Board of Directors present voted not only to attempt intervention in the suit on behalf of their non-protected members, but also to appeal the denial of intervention.

According to HPOA, the issue in opposition to *Edwards* has never been about race. The Association allegedly proposed and gained passage of the original state Civil Service law in 1947, formerly Tex. Rev. Ann. Stat. 1269m. Since that time, according to the Association, it has been unremitting in the fight for officers' rights and has staunchly defended the integrity of the civil service laws.

According to HPOA, the *Edwards* settlement gutted the promotion system. Again according to HPOA, no challenge was made by the City to the plaintiff's statistical analysis "proving" disparate impact and no attempt was made to show that the promotional tests were job related or a fair predictor of future job performance.

The remedial relief granted was the promotion of 96 sergeants and 10 lieutenants from the plaintiff class over a five year period. The prospective relief granted was the application of a log linear analysis to promotional test answers to discard those questions indicating a 20% variation in the performance of all candidates and to extend the life of the promotion eligibility lists from one to two years.

The *Edwards* settlement " . . . would promote 62 Blacks and 34 Hispanics to Sergeant and seven Blacks and three Hispanics to Lieutenant," JE-1, Exh. 11. These promotions were to take place as follows:

Year	Sergeant	Lieutenant
1993	22	3
1994	21	2
1995	19	2
1996	18	2
1997	16	1
Total	96	10

According to uncontroverted testimony by the City's witness(es), these 106 promotions were in addition to the normal number of civil service promotions available to officers through the regular civil service examination procedures. In addition, the City also said that all 106 individuals promoted under the *Edwards* agreement had taken and passed the regular civil service examination with the required score of 70 or better.

The above background information merely shows the extreme interest and opinions that many individuals in HPOA had regarding the *Edwards* settlement.

Three groups of promotions to Sergeant were made in 1993. These were on May 13, 21, and 24. Each group contained originally the names of 16 officers each (GE-1). What is interesting about this list, which was put out by HPD and was available at each promotion session, as near as could be determined, was that the basis for the promotion of each officer was indicated plus the officer's race if that officer was promoted under the *Edwards* lawsuit. The Appellant was listed in the third group as number 11 being promoted as #21 off the current civil service examination list. It is not known for certain how

the promotion list was constructed as far as the lawsuit officers are concerned, but the civil service promotions were by rank and these were interspersed among the lawsuit promoted officers. For example, in group number one promoted May 13, 1993 the 16 positions were as follows:

	Seniority Date	Lawsuit
1	03-23-83 #5 (B) Plaintiff	Edwards Lawsuit
2	11-26-85 Plaintiff	Lee Lawsuit
3	02-27-93 #1 of Current List	
4	10-27-89 #20 (H) Plaintiff	Edwards Lawsuit
5	11-26-85 Plaintiff	Lee Lawsuit
6	04-10-93 #2 of Current List	
7	01-17-87 #17 (B) Plaintiff	Edwards Lawsuit
8	04-24-93 #3 of Current List	
9	07-31-85 #16 (H) Plaintiff	Edwards Lawsuit
10	04-24-93 #4 of Current List	
11	04-29-88 #18 (B) Plaintiff	Edwards Lawsuit
12	04-29-93 #5 of Current List	

13	05-17-84 #8 (H) (sic)	Edwards Lawsuit.
14	04-24-93 #6 of Current List	
15	05-08-93 #7 of Current List	
16	04-29-88 #19 (B) Plaintiff	Edwards Lawsuit

The Appellant testified that he had not seen GE-1 at the time he wrote his 17 May 1993 letter.

On 17 May 1993, the Appellant wrote his letter which is the core of the instant Hearing. It was written on official HPOA stationery and placed in the mailboxes of each HPOA Director. The exact nature of these mailboxes was never established but it was indicated that they were not open boxes that could be seen by any passing individual. The letter was not distributed to any other individuals and, according to the Appellant, he retained the one or two extra copies he had made of the letter.

Officer M. S. Perales, Director #8, says in CE-2 that he was offended by the letter and discussed its content with the President of HPOA. Officer Perales was not satisfied with the action of the HPOA's President so he contacted the President of OSSO, Officer Ignacio Aranda. Director Perales admitted that he never contacted his fellow Director (Appellant) in any manner regarding his feeling about the letter.

On May 26, 1993 the President of OSSO write [sic] the President of HPOA regarding the letter in question in which he states in part (CE-3):

* * *

> OSSO respectfully requests that you, Mr. President, demand Director Vollert's immediate resignation. Further, that you "OFFICIALLY" apologize, via the "Badge and Gun", to the HPOA minority members that were insulted by what appears to be a blanket indictment of all minority promotees by Director Voller's [sic] calloused and irresponsible remarks.

* * *

The HPOA President's reply dated May 27, 1993 (CE-4) merely stated that he, the President, had discussed the letter with the Appellant and that the contents of the letter were not authorized by HPOA, the contents of the letter were the words of the author, and that HPOA did not support or promote racial or sexual bias of any kind.

On June 7, 1993 the President of OSSO, for whatever reason, wrote the Chief of Police (JE-1, Exh. 9) about the Appellant's letter, thus taking the matter outside of the police officers' associations or organization. This letter said in part the following:

* * *

> OSSO respectfully requests that you, as Chief of Police, determine whether this type of behavior is a violation of the rules and regulations of this department. Specifically, section 4.21 Use of Racial Jokes and Slurs of the Houston Police Department Rules Manual.

* * *

Once the above letter was written to the Chief of Police, an IAD investigation was required by the HPD

regulations. This was known by the OSSO President, as he is an IAD officer.

In the June 1993 Newsletter of OSSO NEWS, the lead article on page 1 was the PRESIDENT'S LETTER (JE-1, Exh. 10) regarding the Appellant's letter in question. When this June newsletter was put out is not known. From the other information contained in the newsletter, it would appear that it was put out sometime in June 1993.

Sergeant Brown, IAD Investigator, took statements from Officer Aranda (CE-5), Officer Perales (CE-2) and Appellant (JE-6) following his notification of the complaint to IAD against the Appellant (JE-1, Exh. 7). The parties stipulated that Sgt. Brown showed copies of CE-2 & 5 and gave Appellant JE-9. The results of the IAD investigation went forward through the administrative levels of HPD and were sent back once to IAD for further investigation when there was the possibility of the Appellant's constitutional rights under the First Amendment being violated. Somewhere along the line in the administrative procedure, the recommendation was made that the Appellant should receive divisional counseling for all three alleged violations. However, when the proper supervisor conferred with the Chief of Police about the matter, that supervisor was told by the Chief that he, the Chief, would not accept anything less than a written reprimand. The required supervisors then signed off in support of the Written Reprimand, including the ADC, and said written reprimand was issued on October 8, 1993 by the Chief of Police (JE-1).

The Appellant timely filed a grievance over his written reprimand and the Step II Grievance Hearing denial

dated November 22, 1993 (JE-1, Exh. 5) was issued by the Chief of Police. The Appellant, on December 3, 1993, then notified the Director, Civil Service Commission, of his election to appeal to an independent third party hearing examiner instead of a grievance examiner (JE-1, Exh. 8).

The parties, being unable to settle this matter, have brought it before this Hearing Examiner for a decision.

POSITION OF THE PARTIES

City:

It is the City's position that as a paramilitary organization, the HPD places a very high premium on the character and veracity of its police officers. The underlying rationale for such stringent requirements is, perhaps, rooted in the fact that the public places an enormous amount of trust, responsibility and power in its law enforcement agencies to protect and guard their lives and property. Police officers have the power to effect the arrest of a citizen, seize his personal property and possessions and, even under the most guarded circumstances, to take away the life of another. That power is awesome!

Consequently, the demands for adherence to departmental rules are even more exacting on this profession. Imagine the endless perils faced by a law enforcement agency if that department's operations were constantly undermined by issues of officers' inability to follow the department's internal rules while attempting to enforce the laws of the State of Texas. Thus, the HPD does not treat allegations of failing to adhere to departmental rules lightly.

Moreover, inappropriate conduct and behavior, disrespect for fellow officers, and use of racial jokes and slurs will not be tolerated within the HPD. Statements made which are derogatory and offensive, whether meant as a "tongue in cheek" comment or not, serve only to disrupt the efficient operations of the department and lend no positive result from which either the public or the department could benefit. Therefore, such rules violations must be met with progressive discipline in order to deter any future inappropriate conduct on the part of the Appellant and/or any other member of the HPD with the propensity to commit a same or similar infraction.

Credibility is an issue in the instant case involving the reason and meaning of the Appellant's letter. The Hearing Examiner has several guidelines previously used by arbitrators. Simply put, a credibility issue often turns on who has the most to lose or gain. In the instant case, it is the Appellant who has the most to lose.

In HPOA's opening statement, a contention was made that the written reprimand violated the Appellant's right to free speech. It was contended that the statements were relating to a matter of "public concern," thus, automatically protected by the First Amendment. However, the "public concern" exception, as stated in *Connick v. Myers*, 461 U.S. 138, (1983), is not the beginning and end of the legal analysis of whether an employee's speech could be curtailed by a governmental employer without violating the employee's First Amendment right to free speech. The United States Supreme Court emphatically stated:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Id. at 146.

The HPOA asserts that by imposing disciplinary action against the Appellant for statements made by him to the HPOA Board of Directors, the HPD has violated the Appellant's First Amendment right to free speech. However, the Appellant's contention is ill advised. In *Attaway v. City of Mesquite*, 563 S.W. 2d 343 (Tex. App. – Dallas 1978), the Texas Court of Civil Appeals upheld the lower courts' finding that there was no infringement of constitutional right of free speech when the communication (a cartoon in that case) was not intended to be a serious contribution to public discussion on a matter of general interest. Like Appellant's communications to the members of the HPOA Board of Directors, the Appellant did not intend for his statements to be a serious contribution to public discussion on a matter of public concern.

The Appellant's own witness, 1st Vice President of HPOA, testified and characterized JE-3 as "tongue in cheek," "quirky," "satirical," "funny," "no social redeeming value." He further testified that he did not believe that the writing was a serious contribution to public discussion. He also testified that the HPOA debates regarding the settlement of the *Edwards* lawsuit were no longer going on at the time the Appellant wrote and

distributed JE-3. The lawsuit had been settled, the consent decree was entered, and the benefactors were being promoted.

The Chief's decision to reprimand the Appellant for the writing and dissemination of JE-3 was based on considerations of the Appellant's deliberate violations of Departmental Rules and the effect such communications could have on the Appellant's fellow officers and the HPD as a whole. Testimony, from the President of the OSSO, HPOA Director 6 who is also a member of OSSO and the President of AAPOL confirmed that the members of their respective organizations were offended and irate over the communications of the Appellant. If this type of communication was allowed to be continued unabated and/or condoned by the HPD, the result could very well be war between the "good guys and good guys," instead of between the "good guys and the bad guys," the criminals. It is in the best interest of the public, the HPD and the officers of the HPD to put an end to this type of conduct and behavior, disrespect for fellow officers, and use of racial jokes and slurs.

It is further the City's position that libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation. See the definition stated in the Texas Civil Practice & Remedies Code, §73.001 (1991). Furthermore, slander *per se* is that which affects a person in his or her business, trade, profession, office, or calling. See *Ramos v. Henry C. Beck Co.*, 711 S.W. 2d 331 (Tex.App. –

Dallas 1986, no writ). The statements made by the Appellant in JE-3 could very well be considered defamatory and thus exempt from First Amendment protected speech, not to mention actionable in a court of law by a class of identifiable individuals.

It is the City's position that it has proven its justification for the written reprimand of the Appellant and the grievance should be denied in its entirety.

HPOA:

It is the position of HPOA that the comments contained in the "invitation" clearly refer to the aftermath of the *Edwards* lawsuit. It has been clearly proven by the great weight of the evidence, including the testimony of the City's witnesses, that this was a matter of intense public concern.

Public employees do not lose their First Amendment right to free speech by virtue of their employment. However, even speech that relates to a matter of public concern must be balanced with the ability of the employer to provide effective service to the public. In the instant case, the City has not produced any evidence to show that the HPD operations were in any way affected by the "invitation" to the Appellant's promotion ceremony.

The evidence in this case shows that the Appellant is a valuable employee who interacts well on the job with Officer Perales (GE-6). No causal link was shown by any

witness between the "invitation" and the effective operation of the HPD. The Appellant has every right to disagree with the policies of the HPD and to speak out in opposition to those policies.

The discipline in this case is a blatant attempt to chill the free speech rights not only of the appellant, but for all police officers. HPOA may disagree with what some officers say, but HPOA must defend their right to say it. The Association stands equally ready to defend Officers Perales and Aranda against HPD discipline in similar circumstances.

Every witness in the instant case agreed that this was the first time to their knowledge that HPD discipline had intruded the sanctity of an employee group board room. Association Board meetings are generally open to all members. Will the HPOA Baord [sic] be forced to hold routine business in executive session for fear of offending someone in attendance? Free and open debate is the foundation of our democracy. Government intrusion upon this freedom, even in the work place, must be strictly restricted to clear interference with the actual ability of the public employer to perform the tasks commissioned by the public they serve.

The City admits error by allegedly violating the civil rights of its minority employees, then compounds the error by violating the free speech right of the Appellant who echoes the very sentiments expressed by various courts of this land who have dealt with identical problems in enforcing voluntary affirmative action programs.

Some may wonder why the appellant would appeal a Written Reprimand. The answer is simple. The chief of

Police's Written Reprimand is a permanent part of the Appellant's personnel file. This file will follow him throughout the remainder of his career with the HPD and beyond. The Appellant should not be branded a racist because he opposed the Edwards consent decree. The Written Reprimand attacks the Appellant's integrity and honor, which is the core value of every law enforcement officer. This cannot go unchallenged. This Written Reprimand has far reaching future consequences for someone with aspirations to advance his career in law enforcement. Severity is judged from th perspective of the person receiving the punishment and should be judged on a case by case basis.

The power of a Hearing Examiner to overturn the discipline recommended by the Chief of Police is well defined and broad in nature. The source of this power is found in Tex. Loc. Gov't. Code §143.118, which provides that the Fire Fighter's and Police Officer's Civil Service Commission may reduce or reverse disciplinary suspensions imposed by a department head. This power is granted without any qualifying language referring to "para-military" organizations, or deferral to the decision making authority of the department head. In fact, the language surrounding this grant of power instead empowers the Commission to "instruct the department head" of the action it requires of him, and refers to portions of Tex. Loc. Gov't. Code §143.120 regarding procedures the Commission may use to compel him to do so, including contempt. This same section also provides for mandatory dismissal of department heads who intentionally refuse to comply with such a Commission order for ten or more days. Tex. Loc. Gov't. Code §143.120(f)(g).

The same powers described as being held by the Commission are also held by a Hearing Examiner, should one be designated by the employee pursuant to Tex. Loc. Gov't. Code §143.1016. The powers are specifically granted by Tex. Loc. Gov't. Code §143.129 (d), 143.057(f), which vests a Hearing Examiner with "the same duties and powers as the commission . . . "

A Hearing Examiner is not required to accept the judgment of the Chief of Police without question. In the context of this case, it is clear that any discipline is severe if the underlying facts are not true or if the relevant conduct is protected as a fundamental freedom. A Hearing Examiner may freely and impartially reevaluate the wisdom of the Police Chief to impose any punishment.

In conclusion, the Appellant is not a racist. It is a stretch to pull a racial slur out of the "invitation" on its face, but within context it is plain that the reference is to recipients of the endowment of the *Edwards* settlement. The Appellant's letter vented frustration at the system of intentional reverse discrimination decreed by the settlement of the *Edwards* lawsuit. Both he and the HPOA dispute the validity of the proof of disparate impact accepted by the City. The litigation continues in the U.S. Fifth Circuit Court of Appeals and, if necessary, beyond. The only question here is whether the HPD will be allowed to use formal discipline to sanction anyone who dares speak out in opposition to its policies when such speech in no way affects the effective operation of the Police Department.

The Appellant, based upon the above and foregoing, respectfully requests that this grievance be sustained,

that the Written Reprimand be overturned and that the Written Reprimand be expunged from his personnel file.

DISCUSSION

In the area of discipline, it is incumbent upon the City to prove guilt of wrongdoing as specified in TLGC §143.1015(J) which says:

> In any hearing relating to the appeal or review of an action of the department head that affects a fire fighter or police officer the department head shall have the burden of proof. The department head is required to prove the allegations contained in the written statement, and the department head is restricted to the written statement and charges, which may not be amended.

The Statement of the Issue asks whether or not the Chief violated any law, rule or regulation when he disciplined the Appellant with a Written Reprimand. To prove its case as specified above, the standard has been set forth in what was formerly VACS 1269(m), namely:

1. Are the charges made by the Chief true as made?

2. Are these charges legally sufficient?

3. Is the punishment appropriate for the offense?

In the area of burden of proof or burden of the affirmative, the City has the initial burden to justify its action. Once this burden has been shouldered, the burden of the affirmative passes to the Appellant who must, if he

is to prevail, either successfully refute the City's establishing of "just cause" or else prove mitigating circumstances.

The burden of the City can be satisfied through the establishment of a "prima facie" case. This condition has generally been defined as a presentation of evidence, sufficient in quality and quantity to warrant a ruling by a Hearing Examiner in favor of the presenting party "if no contrary evidence" is proffered by the opposing party (I. B. Jones, *Evidence,* ¶205, 5th Ed., 1958 Supp. 1971 as cited in Owen Fairweather, *Practice and Procedure in Labor Arbitration,* BNA, Inc., p. 201).

If the Appellant admits that s/he has performed the act for which s/he was disciplined, the affirmative of the issue generally moves to the Appellant. S/he must prove that there was good reason or excuse for his/her acting as s/he did. Should the Appellant successfully establish his/her reason or excuse for having committed the act(s), the burden shifts back to the City.

As pointed out by the parties, the instant case involves matters of credibility. In order to establish proof it is possible for a Hearing Examiner not to make an uneasy, highly uncertain credibility choice between opposing witnesses merely by using a legal device for determining the facts from conflicting evidence in the record. This device is the introduction of a presumption which places the burden of proof on one of the parties to produce sufficient evidence to avoid a ruling against that party on the issue. The party having the burden of proof is said to have the "affirmative of the issue," meaning that it is the party that would be defeated if the bare

question to be answered were put to the Hearing Examiner and no evidence were given on either side. Furthermore, in imposing the "affirmative of the issue," it is done imposing same "upon the party whose contentions depart further from normal likelihood" (John MacArthur, *Evidence: Common Sense and Common Law,* The Foundation Press, Inc., Mineola, N.Y., 1947, p. 179).

The Hearing Examiner has listened to the tapes made at the Hearing, read the post-Hearing briefs plus all exhibits and cited cases. Based on the above, the Hearing Examiner will develop his rationale for his award.

The first matter that must be addressed is the Appellant's contention that the Written Reprimand was a violation of his First Amendment right to free speech. The contention was made that the contents of the letter in question were relating to a matter of "public concern"; therefore, said statements made in the letter were automatically protected by the First Amendment.

Public employees do not necessarily lose their First Amendment rights to free speech by virtue of their employment as a public employee (police officer). HPOA's position is that even speech that relates to a matter of public concern must be balanced with the ability to provide effective service to the public. *Rankin v. McPherson,* 107 S. Ct. 2891 (1987) and other references not cited. The City, on the other hand, asserts that imposing disciplinary action against the Appellant for the letter he distributed to a small group of HPOA officers on the HPOA Board of Directors does not violate the Appellant's First Amendment right to free speech as the letter in question was not intended to be a serious contribution to

public discussion on a matter of general interest. The basis of the City's position is *Attaway v. City of Mesquite,* 563 S.W. 2d 343 (Tex. App. – Dallas 1978).

The Appellant testified that he did not intend the invitation (letter) to go beyond the HPOA Board of Directors. Even the Appellant's own witness, the 1st V.P. of HPOA, testified that the letter (JE-1, Exh. 3) was "tongue in cheek," "quirky," "satirical," "funny" and had "no social redeeming value." This HPOA officer further testified that he did not believe that the letter was a serious contribution to public discussion. He also testified that the HPOA debates regarding the settlement of the *Edwards* lawsuit were no longer going on at the time the Appellant wrote and distributed JE-1, Exh. 3. The *Edwards* lawsuit had been settled, the consent decree was entered and the benefactors were in the process of being promoted (GE-1 dated May 13, 1993).

In *Connick v. Myers,* 103 S. Ct. 1684 (1983); *Moore v. City of Kilgore, Tex.,* 877 F. 2d 364 (5th Cir. 1989); and *Pickering v. Board of Education,* 88 S. Ct. 1731 (1968) a line of reasoning develops the questions of whether or not an Appellant's letter addresses a matter of public concern by the content, form, and context of a given statement, as revealed by the entire record, and whether or not the Appellant's letter adversely impacted the operation of the HPD.

As previously set forth, the letter was actually intended for the 11 HPOA Board of Directors to which it was distributed, not the entire police force or the general public. In fact, the letter did not directly address the *Edwards* lawsuit. Only an individual who was familiar

with the consent decree itself (*Edwards* lawsuit settlement) would know precisely the entire meaning of the invitation (JE-1, Exh. 3). And even those consent decree knowledgeable individuals who eventually read JE-1, Exh. 3 did not agree as to the meaning of the JE-1, Exh. 3 wording. This is apparent from the testimony of the many witnesses who testified at the Hearing. Was the issue of the consent decree a matter of great public concern? It was to the police officers of HPD, but nothing was present to indicate that the general public had much concern and particularly when the newspaper articles of JE-1, Exh. 11 pointed out the minimal cost effect of the settlement due to the plaintiffs giving up all claims to back pay, that is, pay from 1993 back to 1982. The only immediate cost to the City was the differential in pay between the old and new ranks for the 106 officers promoted under the consent decree over the five year period.

It is the Hearing Examiner's opinion that JE-1, Exh. 3 was not a great public concern.

What, if any, was the impact of JE-1, Exh. 3 on the operation of HPD? This is a question which is difficult to answer in an absolutely correct manner as the "pot had not stewed long enough" for the results to boil over into the day to day operation of HPD due to the handling of the matter by the Chief of Police. The President of OSSO, is his newsletter article (JE-1, Exh. 10), pointed out rather plainly the possible impact that certain terms used in JE-1, Exh. 3 by a new supervisor (the Appellant) might have on the Appellant's future relationship with the minority officers working under the Appellant. Even though there had not been any problems as of the date of the Hearing, at least none that anyone knew about, there

very well could have been or would have been in the future. However, it was pointed out at the Hearing that the area the Appellant was assigned after promotion was the jail. Due to the lawsuit settlement, there was testimony that the jail assignments were not being made to the minority personnel. Since the assignment of personnel to the jail was not fully explored at the Hearing, other than what is stated above, there is the possibility that there were few officers assigned to the jail that might have taken offense at JE-1, Exh. 3, hence the jail would suffer a minimum possible disruption due to the language of JE-1, Exh. 3.

The Hearing Examiner can only say that JE-1, Exh. 3 had the potential of disrupting the operation of the HPD. Hopefully, the action taken by the Chief has short circuited the possible disruptive propensity of JE-1, Exh. 3.

In summary, this Hearing Examiner cannot say that the Appellant's First Amendment rights were violated by the action taken by the Chief of Police (JE-1, Exh. 1).

The remainder of this case deals with the "just cause" portion for the disciplinary action, that is, the three questions set forth in the first portion of this section of the Award.

1. Are the charges made by the Chief true as made?

2. Are those charges legally sufficient?

3. Is the punishment appropriate for the offense?

The Appellant was charged with the violation of three HPD Rules:

Section 2.3 – Conduct and Behavior.

3.1 – Respect for Fellow Officers.

4.21 – Use of Racial Jokes and Slurs.

The appellant admitted he wrote the invitation letter in question (JE-1, Exh. 3) and how he distributed it to only the other HPOA Board of Directors. As previously stated and admitted by the Appellant, the JE-1, Exh. 3 was his reaction to the *Edwards* consent decree. This decree was handed down by a Federal Judge and, regardless of the appellant's feelings, any fault in the decree lies with the court system and not fellow employees of HPD. The decree is now the law for 10 years unless Judge Hughes' decision is reversed by a higher Federal Court. The Appellant even testified that his objection to the terms of the consent decree was that he had spent many weeks studying for the sergeant's examination and he did not feel it was fair or right for someone to be promoted who did not have to study as hard as he did. Nothing was presented at the Hearing to give the Hearing Examiner any idea or feel for the amount of study time needed by other officers to make a sufficiently high score in order to be selected for promotion. Nor was any evidence presented as to the amount of study time that any other officer spent prior to taking the sergeant's examination. Nor was anything presented about previous rankings or scores (other than the 1993 promotion list). Of the 96 officers promoted by the consent decree to the rank of Sergeant, all 96 of them had passed the examination with the required 70% or better. Again, no one knows how hard these 96 officers studied before taking the examination, but whatever the amount, it was sufficient to score above 70%. Furthermore, the consent decree was based

on adverse impact of the test questions for Sergeant and Lieutenant as well as the questions not necessarily being job-related or consistent with business necessity (CE-1). The Hearing Examiner can only say that if the few questions that were in the documents furnished him at the Hearing were examples of the test questions, the examinations must have contained an unknown amount of non job-related and non business necessity questions. All the Hearing Examiner can say is that from 1965-1993 he gave objective tests in labor relation courses but was never able to eliminate all of the non subject matter, ambiguous or nit-picking questions from the tests. In the consent decree itself (CE-1), the adverse impact was shown using statistics. One of the court's remedies was that a log linear analysis be made of the test questions so that the questions that were bad, in the eyes of the court, could be thrown out. Thus spoke the Judge. The Hearing Examiner has taught graduate statistics and took about 36 hours of statistics in his academic work.

The above is again to point out that it was the Judge, not the Appellant's fellow officers, who made the rules and dictated the promotions of the 106 protected officers.

Race was specifically a part of Judge Hughes' consent decree, so the word "race" by itself in JE-1, Exh. 3 was already being used by Judge Hughes. Also HPD indicated and H or B on its promotion list (GE-1) for the May 1993 consent decree promotees. So just the word "race" in the invitation, by itself, should not be any more offensive than the other sources cited above.

The remainder of the invitation will now be discussed.

* * *

> . . . You are cordially invited to attend and give proper and justice (sic) respects to those who deserve it. . . .

The words " . . . to those who deserve it . . . " are certainly putting down someone and, in effect, are defying Judge Hughes' consent decree. Since it is known that the invitation was directed at the officers being promoted by the consent decree, this sentence therefore is violating Sections 2.3 and 3.1.

The last sentence of the invitation says:

* * *

> . . . There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it.

There is nothing defamatory about "remedial," but when it is used in the context of " . . . 'remedial' promotions from the welfare list . . . " the word takes on a different meaning. The Appellant is now calling the consent decree a welfare list. This statement is a violation of Sections 2.3, 3.1 and 4.21.

The last clause in the invitation says:

> . . . but they should stand out should you decide to congratulate only those who deserve it.

Since the consent decree promotions were all African-American or Hispanic-American officers and GE-1 so designated them, this would allow these officers to be recognized by individuals at the promotion ceremony as being promoted from the consent decree. The Appellant

in this last clause is holding the consent decree promotion officers up for ridicule and again thumbing his nose at Judge Hughes. This portion of the invitation is also a violation of Sections 2.3, 3.1 and 4.21.

In summary, the decision of the Hearing Examiner is that the charges made by the Chief are true as made.

The next question is, "Are those charges legally sufficient?" The answer is a simply "yes." However, there are some other items that need to be brought forward. HPOA has accused HPD of meddling in the internal affairs of its Board of Directors. To a certain extent this is true, but the real guilty parties are the Appellant and a Board of Directors member. The Appellant wrote the invitation on official HPOA stationery. This made the statement a semiofficial HPOA position until it was properly denied. According to the testimony by the President of HPOA, the only action taken against the Appellant was to tell him not to do it again. No evidence was presented to indicate that the HPOA President presented the situation to the Board of Directors to obtain the Board's input as to what action should be taken against the Appellant for misusing HPOA stationery and thus putting HPOA "on the spot." The other guilty party in this matter is the Board of Directors member who did not present the invitation to the Board of Directors for their consideration of what should be done about the situation. Instead, this individual went outside of the HPOA Board to the President of OSSO. Had this action taken place in the private sector, there is a good possibility the guilty Board member would have been possibly fined and/or kicked out of the Union. But the instant matter is in the public sector and it is unknown what is in the HPOA constitution.

The City has set forth its position that the Appellant's invitation could very well be considered defamatory and actionable in a court of law by a class of identifiable individuals. This matter was not specifically addressed in the Chief's Written Reprimand so it is a moot issue as far as this Hearing Examiner is concerned.

The answer to this question is still "yes."

The last question is, "Is the punishment appropriate for the offense?"

The recommendation that came forward to the Chief was Divisional Counseling (JE-1, Exh. 4). According to supervisory testimony, the Chief would not accept anything less than a Written Reprimand, so the recommendation eventually got back to the Chief for a Written Reprimand.

Can a Hearing Examiner mitigate the discipline of the Chief? The answer is "yes." TLGC §143.118 provides that the Civil Service Commission can reduce or reverse disciplinary suspensions imposed by a department head (Chief of Police). TLGC §143.129(d) and 143.057(f) vest the Hearing Examiner with " . . . the same duties and power as the commission . . . . "

This entire case, its background and its future application are full of time limits. As an example, the basic remedial time period was for 1982 to 1991. The lifetime of the eligibility lists for promotions was changed from one to two years, the promotion of the 106 individuals was to take place over five years, the Court retained jurisdiction for 10 years, a yearly report was due the Court by HPD on promotions. Lastly, HPD supervision testified that the

Chief, in running HPD, always looked back three years in an officer's personnel file for any disciplinary matters. In the instant case, the only indefinite action is the Written Reprimand given the Appellant. This disciplinary action will follow the Appellant for the rest of his life and, in effect, brand him as a racist. In spite of being guilty as charged, the Appellant wrote the invitation after many weeks of emotional discussion in the Board meetings about the forthcoming consent decree. The Board members present even voted 100% to oppose the consent decree. The Appellant merely got carried away with the subject matter of the times and should not be made to suffer for the rest of his life for having written the invitation. So what would be a reasonable period for the Written Reprimand to be effective? The answer is sitting right in front of us, namely, three years since that is the time frame the Chief uses to look back at disciplinary records. Furthermore, the Appellant has a "clean record" except for the instant matter.

In summary, the Chief of Police did not violate any law, rule or regulation when he issued a letter of Written Reprimand to the Appellant.

AWARD

The letter of Written Reprimand is upheld for three years from its date of issue. If at the end of those three years the Appellant has not received any more disciplinary actions, the Written Reprimand is to be removed from his file and/or record, per those instructions in TLGC §143.

Since the possible modification of the Written Reprimand is an uncertainty for two more years, the Award is not a split decision and therefore HPOA must pay the hearing Examiner's charges.

/s/ Milden J. Fox, Jr.
Milden J. Fox, Jr., P.E., Ph.D.
29 September 1994

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OSSO NEWS
"THE BEAR NEWS"
June 1993 Newsletter

PRESIDENT'S LETTER

by Ignacio Aranda

There is an attitude that prevails among some officers, that the Hispanic-American and African-American officers promoted as a result of the promotional lawsuit are less deserving than those officers promoted from the existing eligibility list.

Such an attitude was expressed on "OFFICIAL" HPOA stationary by HPOA Board of Director #12, Johnie Vollert. In the letter, Director Vollert issued an invitation to attend his promotion on May 24, 1993 at the High School of Law Enforcement. Director Vollert writes that he is "getting promoted (despite my race)" and that those invited to attend should give proper and just respect to those who deserve it. Director Vollert also writes that "There will be a number of "remedial" promotions from the welfare list, but they should stand out should you decide to congratulate only those who deserve it."

Director Vollert's letter is RACIALLY BIASED and DEMEANING to all promotees, some of whom are members of the HPOA. What is more disturbing than his letter is that Director Vollert is a police officer who has been

promoted to the rank of Sergeant, a supervisory position, and without a doubt will be supervising minority members of this department. How can we expect a supervisor with this attitude to be fair and impartial when he deals with minority subordinates. This is one example that the promotional test alone does not produce the best person for promotion.

As OSSO President, I find that this letter written by a Board of Director of Texas' Oldest and Largest Police Association is in poor taste and offensive not only to OSSO but to all minorities of the Houston Police Department.

I wrote a letter to HPOA President, Doug Elder, voicing my concern and utmost contempt at the irresponsible remarks made by one of his Board of Directors. I requested that he as HPOA President immediately demand that Director Vollert resign his board position. President, Elder as the leader of Houston's largest police employee group should hold his directors accountable for such remarks, especially when the remarks are offensive to a segment of their own membership. If in fact the HPOA does try to provide fair and equal representation to all of their members, as they claim this would be an opportunity for them to demonstrate that.

I received a response from HPOA President, Doug elder, in which he stated that he had "contacted Sgt. Vollert and discussed the issuance of an unauthorized letter on HPOA stationary", and that the "contents of the letter were the words of the author, not the policy or position of the HPOA." President Elder further states that the HPOA values its members and does not support or promote

racial or sexual bias of any kind. If these are the true feelings of the HPOA, then why do they still have a Board of Director who promotes racial bias.

We should not remain silent and allow this type of attitude to prevail. We must speak out as an organization, individual members of the HPOA and as fair minded people. This type of attitude and racial bias will not end by remaining silent, it will only get worse. SPEAK UP AND BE HEARD!